TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 316.

SEBASTIAN DE LA RAMA, PLAINTIFF IN ERROR AND APPELLANT,

vs.

AGUEDA BENEDICTO DE LA RAMA.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED AUGUST 2, 1934.

(24,488)

(24,328)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 216.

ESTEBAN DE LA RAMA, PLAINTIFF IN ERROR AND APPELLANT,

vs.

AGUEDA BENEDICTO DE LA RAMA.

IN ERROR TO AND APPEAL FROM THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

INDEX.

	Original.	Print
Transcript of record from the court of first instance of Iloilo..	1	1
Bill of exceptions	1	1
Complaint	1	1
Answer	6	4
Motion to strike answer	10	5
Order on motion to strike	11	6
Trial, etc.	11	6
Judgment and opinion	13	7
Defendant's exceptions, etc	41	21
Clerk's certificate to bill of exceptions	43	22
Notice and agreement to amend bill of exceptions	43	22
Judge's certificate to bill of exceptions	44	23
Clerk's certificate to bill of exceptions	45	23
Additional bill of exceptions	45	24
Motion for a new trial	45	24
Order denying motion for a new trial	47	25
Assignment of errors	48	25

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 17, 1916.

	Original.	Print
Petition for leave to present statement of facts	50	26
Order overruling petition	54	28
Motion to file exceptions by appellee	54	28
Petition for appeal	56	29
Exhibit A—Judgment of court of first instance	58	30
Affidavit of H. D. C. Jones	59	31
Order allowing appeal, etc	60	32
Bond on appeal	61	32
Clerk's certificate	63	33
Citation and service	64	34
Decision of court of first instance on second trial	66	35
Judgment of court of first instance on second trial	96	50
Order on motions for new trial	97	50
Order on motion for execution	98	50
Judge's certificate to bill of exceptions	99	51
Clerk's certificate to bill of exceptions, court of first instance	100	51
Decision of supreme court on second appeal	101	52
Notice of decision to counsel	116	58
Petition for rehearing	116	59
Order denying petition for rehearing, etc	119	60
Judgment	120	60
Petition for writ of error	121	61
Assignment of errors on writ of error	122	61
Writ of error and allowance (copy)	124	62
Citation and service on writ of error (copy)	126	63
Petition for appeal and allowance (copy)	127	63
Assignment of errors on appeal	128	64
Citation and service on appeal (copy)	130	65
Petitions for extension of time and order	131	65
Motion and order as to sureties on bond	134	67
Praecipe for transcript of record	135	67
Bond on writ of error and appeal	137	68
Clerk's certificates	138	69
Judgment on second trial	140	70
Writ of error and allowance	141	71
Citation and service on writ of error	143	72
Petition for appeal and allowance	144	73
Citation and service on appeal	145	73

1 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

R. G. No. 7476.

PHILIPPINE ISLANDS,
City of Manila, ss:

Be it remembered, that on the 21st day of November, 1911, the following bill of exceptions was filed in the Supreme Court of the Philippine Islands in the case of Agueda Benedicto de la Rama, plaintiff and appellant, vs. Esteban de la Rama, defendant and appellant, on appeal from the judgment of the Court of First Instance of Iloilo, Philippine Islands:

Between—

AGUEDA BENEDICTO, Plaintiff,
and
ESTEBAN DE LA RAMA, Defendant.

Divorce Proceedings.

Bill of Exceptions.

Facts.

On the 29th of October, 1901, Doña Agueda Benedicto, the wife of Don Esteban de la Rama, filed the following complaint for divorce against the latter:

Complaint.

Comes now the above-named plaintiff and institutes proceedings against the above-named defendant, alleging as a cause of action:

First. That on the ninth day of July, 1891, in the town of Valladolid, Province of Occidental Negros, Philippine Islands, the plaintiff, Agueda Benedicto de la Rama and the defendant,
2 Esteban de la Rama, were united in marriage and since that time they have been and now are both man and wife for the legal effects of the said marriage.

Second. That in or about the month of August of 1892, the defendant, failing to fulfil the promises made by him at the time of his marriage, intentionally and without any reason whatever, abandoned the plaintiff; that since that date he continues, also intentionally and without any reason therefor, to abandon the said plaintiff, living separate and apart from her, without cause or sufficient reason, against her will and without her consent.

Third. That the marriage is without issue.

That as a separate and distinct cause of action, the above-named plaintiff sues the defendant, likewise named above, and alleges:

First. That on the ninth day of July, 1891, in the town of Valladolid, Province of Occidental Negros, Philippine Islands, the plaintiff, Agueda Benedicto de la Rama and the defendant, Esteban de la Rama, were married and since that time have been and now are husband and wife for the effects of said marriage.

Second. That during the month of December of 1892, on many and repeated occasions up to the beginning of October of 1901, the marriage of the plaintiff with the defendant being in force and they being husband and wife for the legal effects of the said marriage, the defendant, in the town of Talisay, Province of Occidental
3 Negros, Philippine Islands, committed adultery with one Gregoria Bermejo, and during all of the said time has been living carnally and adulterously with the said woman and committing adultery with her in the said town of Talisay.

Third. That from these carnal and adulterous relations with the said Gregoria Bermejo, there was born a girl, which is now approximately four or five years of age.

Fourth. That all and each one of these adulterous acts were committed without the consent, connivance, knowledge, or procuration of the plaintiff; that the latter has no longer cohabit with the defendant since the commission of the various acts of adultery of the defendant here alleged.

Fifth. That the acts of adultery above-referred to, together with the birth of the child, the result of such carnal and adulterous union, have brought about public scandal with contempt for the wife.

Sixth. That the marriage was without issue.

That as a separate and distinct cause of action, the above-named plaintiff sues the said defendant and alleges:

First. That on the ninth day of July, 1891, in the town of Valladolid, Province of Occidental Negros, Philippine Islands, the plaintiff, Agueda Benedicto de la Rama and the defendant, Esteban de la Rama were united in marriage and since that time they have been and now are both man and wife for the legal effects of the said marriage.

Second. That in the beginning of the year 1899, approximately, on many and repeated occasions, up to the 12th of August
4 of 1901, the legal effects of the marriage between the plaintiff and the defendant then subsisting and they being husband and wife, the defendant, in the town of Bago, Province of Occidental Negros, Philippine Islands, committed adultery with a woman named Antonia Guzman and during all that time lived with her in the said town of Bago, in public and notorious adultery.

Third. That from this said illegal union and his adulterous cohabitation with the said Antonia Guzman, there was born a girl that is now about two years of age.

Fourth. That all and each one of said adulterous acts were committed without the consent, connivance, knowledge or procuration

of the plaintiff; that the latter has no longer cohabited with the defendant since the commission of the various adulterous acts of the defendant here alleged.

Fifth. That the adulterous acts above-referred to, together with the birth of the said child, the result of such carnal and adulterous relations, have caused public scandal with contempt for the wife.

Sixth. That the marriage was without issue.

That as a separate and distinct cause of action, the above-named plaintiff sues the defendant, also named above, and alleges:

First. That on the ninth day of July, 1891, in the town of Valladolid, Province of Occidental Negros, Philippine Islands, the plaintiff, Agueda Benedicto de la Rama and the defendant, Esteban de la Rama, were united in marriage and since that time they have been and now are both husband and wife for the legal effects
5 of the said marriage.

Second. That during the year 1900, the plaintiff and the defendant being husband and wife, the defendant on many and repeated occasions in the town of Molo, Province of Iloilo, Philippine Islands, committed adultery with a woman named Salvación Confesor, and on many and repeated occasions up to the present time, during the year 1901, the plaintiff and the defendant being husband and wife, the defendant in the city of Iloilo, Province of Iloilo, Philippine Islands, in the lower part of the house of Coscoluela, situated in Calle Marina, committed adultery with the said Salvación Confesor, and during the said time he lived and now lives in public and notorious adultery and has had carnal and adulterous connection with said Salvación Confesor in the said city of Iloilo.

Third. That from the said illegal relations and adulterous cohabitation with the said Salvacion Confesor, a child was born; that the plaintiff does not know the sex of the said child and that it is approximately one month old.

Fourth. That all and each one of the said adulterous acts were committed without the consent, connivance, knowledge or procuration of the plaintiff; that the latter has not cohabited with the defendant since the commission of the various adulterous acts of the defendant here alleged.

Fifth. That the adulterous acts above-referred to, together with the birth of the said child, the result of the said carnal and adulterous relations, have caused public scandal with contempt for the wife.

Sixth. That the said marriage was without issue.

6 Wherefore the plaintiff prays that judgment be rendered against the defendant:

First. Decreeing the separation of the plaintiff from the defendant.

Second. Ordering and decreeing equal partition of the conjugal partnership property.

Third. Allowing the plaintiff a monthly pension for her support of P1,000, Mexican currency, during the course of these proceedings, and also a reasonable sum for attorneys' fees and the costs of the suit.

Fourth. And such further remedy as the honorable court consider to be equitable and just.

Iloilo, Philippine Islands, October 29, 1901.

AYLETT R. COTTON,
Counsel for the Plaintiff.

Copy.
AYLETT R. COTTON.

To this complaint the defendant filed the following answer:

Heading and Title.

Answer.

In answer to the complaint filed by the plaintiff, the defendant sets forth:

As to the first cause of action.

First. That it is true that on the 9th day of July, 1891, the defendant married the plaintiff in the town of Valladolid, Island of Occidental Negros.

7 Second. That the plaintiff's statement that in about the month of August of the following year, 1892, the defendant intentionally and without any reason therefor abandoned the plaintiff, and lived apart from her without sufficient cause or reason, is not true.

Third. That the defendant did not abandon her without reason therefor, but he expelled her from his house as being unworthy, in view of the following facts which he sets forth in his defense:

Two days after the marriage in Valladolid, he moved with his wife, the plaintiff herein, to the town of Talisay, where he customarily resided. The defendant was then administrator of the estates which his late father possessed in the Island of Negros and frequently had to absent himself from the house to inspect the progress of the work of the administration of the estates, sometimes going south and at others north, absences which lasted three or four days or more. At that time there was stationed in Talisay a detachment of the Guardia Civil, in charge of a Spanish corporal named Zabal, who in the guise of friendship, used to frequent the house of the defendant. The latter entertained no suspicions until he was confidentially advised that during his absence, the said corporal used to climb up by the porch of his house, was received by his wife and used to spend the night with her. On being told of the matter and not being able to believe in such infamy, the

8 defendant set out to learn the truth. On being convinced of his disgrace he tried to fix on some form of vengeance, but he found nothing better to comport with his dignity as a gentleman than to return his wife to her parents' house and to turn her out as unworthy of his own.

Fourth. That the defendant married the plaintiff against the wishes of his parents simply to protect the honor that she had confided to him and which she was later unable to preserve.

Fifth. That after this great infamy, and missing a position that entailed all manner of consideration, the plaintiff personally, by means of letters and finally through the medium of third persons, sought to obtain the defendant's pardon and asked him to forget the past; this the latter has always refused.

Sixth. That the said marriage was without issue and no conjugal property of any sort has been acquired.

As to the second, third and fourth causes of action alleged in the complaint, the defendant in his defense sets forth:

First. That the facts set forth therein are not true.

Second. That even if they were true they are nothing but the necessary consequence of the unqualifiable conduct of the plaintiff.

As to the petition of the plaintiff to be allowed a monthly sum of P1,000 for her support, the defendant in his defense sets forth:

First. That the plaintiff is convicted of having committed adultery and that the said adultery was the reason why
9 the defendant turned her out of his house as being unworthy.

Second. That the plaintiff has resources of her own; that she has more than sufficient means to enable her to live in comfort and she has no need of anyone to support her.

Third. That the defendant's income is only P450 per month, paid to him for his services as manager of the firm of Hijos de I. de la Rama, an amount which is absolutely necessary to enable him to live in decency and in the style that his position as manager demands.

Wherefor- he prays the court to decree:

First. A divorce or separation between the defendant and the plaintiff by reason of the adultery committed by the latter.

Second. That between the defendant and the plaintiff there is not, nor has there ever been, any property held in common and therefore the separation of property asked for by the plaintiff be denied.

Third. That the defendant is not obliged to furnish support to the plaintiff.

Iloilo, November 19, 1901.

JOVITO YUSAY,
Counsel for the Defendant.

I certify that a copy of this answer has been furnished the plaintiff.

Iloilo, November 19, 1901.

JOVITO YUSAY.

10 This answer having been filed, the plaintiff filed the following motion with respect thereto.

Heading and Title.

To the Defendant and His Attorney, Don Jovito Yusay:

By these presents, the plaintiff and her attorney notify you that on the 30th day of November, 1901, at nine o'clock in the morning, or as soon thereafter as the attorney can be heard, in the Court of First Instance of Iloilo, the said plaintiff will ask the said court to strike from the answer to the complaint the following statements:

1st. That part of No. 3 of the answer to the first cause of action which commences with the words "As unworthy, in view of the following facts" and concludes with "Turn her out as unworthy of his own" as being false, irrelevant and improper.

2nd. That part numbered 4 of the same answer to the same cause of action and that numbered 5 of the same as being irrelevant and improper.

3d. That part of No. 6 of the same answer to the same cause of action which says "That no conjugal property of any sort has been acquired" as being irrelevant.

4th. Numbers 1, 2, and 3 of the paragraph of the answer that refers to the P1,000 for support as being false and irrelevant.

At the hearing of this motion the plaintiff will read in evidence the complaint, the answer and this motion.

Iloilo, November 27, 1901.

AYLETT R. COTTON,
Attorney for the Plaintiff.

11 After the hearing of this motion, the following decision was rendered.

"The foregoing motion having been heard, as well as the oral arguments of the attorneys for both sides, and their allegations having been duly considered, the Court decrees and orders: that the fourth paragraph of the defendant's answer be stricken out for the reason that it is of no importance in the matter at issue and that in any case it is improper; that all the other points of the motion are denied; that the answer be amended by this order in the manner above mentioned and that after it be so amended that it be admitted. Given in Iloilo this 4th day of December, 1901."

HENRY C. BATES,
Judge of the 9th District.

The case was tried in this city of Iloilo by a special judge by reason of the fact that the Judge of the District, Mr. Bates, excused himself from hearing the case. The parties presented as witnesses the following persons:

For the plaintiff:

Antonia Guzman, Antonio Eugenio Guzman, Agueda Benedicto de la Rama, Mariano Villanueva, Tomas Manola, Isaac Mondia, Cipriano Camposano, Gregorio Sison, Clara Cora, Norberto Evan-

gelista, Epifanio Sison, Doroteo Garcia, Andrea de la Rama, James Borre, Cesar Montorio, Valeriano Cohaler, H. G. Robertson, Fred A. Thomson, Espiridion Guanco, Samuel Luchsinger, Agueda de la Rama (de nuevo) W. A. Clellan, H. G. Robertson (de
12 nuevo) Fortunato Fuentes, W. A. Clellan (de nuevo) Esteban de la Rama, Pelagio Hernaez, Isidro Misares, Pedro Deoca, Salustiano Lisares.

For the defendant:

Salustiano Lisares (de nuevo) Pelagio Hernaez, Andrea de la Rama, Agueda de la Rama, Apolonia Aurelio, Domingo Jardeleza, Apolonia Aurelio, (de nuevo), Juan Juzgapa, Eugenio Ventoso, Ildefonso Coscoluela, Gabino Alegro, Eugenio Ventoso, (de nuevo) Esteban de la Rama.

Witnesses on cross examination:

Doroteo Garcia, Andrea de la Rama, Epifanio Sison, Agueda Benedicto de la Rama, Apolonia Aurelio, Domingo Jardeleza, Esteban de la Rama.

The testimony of these witnesses is attached to this bill of exceptions and forms an integral part thereof.

Various documentary proofs were submitted. The plaintiff presented certain documents referring to the estates and other property that the firm of Hijos de I. de la Rama possesses in Iloilo and Negros, the will of Gabriel Benedicto, father of the said plaintiff, and the deed of partition of his property between his widow and children. On the part of the defendant there was presented Agueda Benedicto's letter to him dated the 6th of March, 1899; another letter from the plaintiff to the defendant of the 15th of July, 1901; the articles of incorporation of the firm of Hijos de I. de la Rama; the inventory of the plaintiff's property and the valuation of the property belonging to the estate of Gabriel Benedicto, father of the plaintiff, which documents are also attached to this bill. No proofs other
13 than these were presented at the trial of the case.

Evidence having been submitted by both sides, as well as oral and written arguments; these latter by express permission of the court and filed within the time fixed by him, in which arguments the respective attorneys set out what was necessary for the rights of their clients, the court rendered the following

Judgment.

Heading and Title.

Decision of the Court.

The plaintiff and the defendant were legally united in matrimony on the 9th of July, 1891, the wife then being 14 years of age and the husband 23, and they lived happily together for the space of about thirteen months. In August of 1892 they separated, and the question to be decided in this litigation is the real cause for the separation.

The wife seeks a divorce under the provisions of paragraph 1 of

article 105 of the Spanish Civil Code which provides that when the adultery on the part of the husband is committed with public scandal or contempt for the wife, it is grounds for divorce.

The wife alleges that not only did her husband abandon her without just cause, but that he had committed adultery with three women and had had children by all of them. These acts were committed with public scandal and with contempt for her.

In his answer, the husband denies the charge of adultery and presents a cross complaint of adultery against his wife, alleging
14 that she had committed this crime in the early part of the year 1892; that he had made this discovery at the beginning of August of the same year, from which time he immediately ceased to have any marital relations with her and refused thereafter to support her. This adultery which he claims his wife to have committed, the husband asserts positively took place in the town of Talisay, Island of Negros, in the house which they then occupied, the lover being a corporal of the Spanish army named Zabal.

The plaintiff, in her petition, not only prays for a decree of divorce, but she also asks that the goods and properties of the conjugal society be separated and divided between them; that she be given a monthly allowance of P1,000 for her support during the course of the trial and furthermore that she be allowed her attorneys' fees and the costs of the suit. In the same way the defendant prays for a decree of divorce in his favor; he denies the existence of goods or properties belonging to the conjugal society, and asks thereafter that no division be made; he also denies any responsibility for furnishing the plaintiff with support during the course of the proceedings.

The evidence in this case was taken in the Province of Iloilo, during the third week of the month of March of the present year, both parties having presented a large number of witnesses whose testimony was carefully studied by me. The court has had the further advantage of obtaining written arguments, carefully pre-
15 pared at length by the respective attorneys.

Before proceeding to a discussion of the financial condition of the parties, as well as the character, nature and origin of their properties, it is logical and necessary to determine in the first place if either of them, the husband or the wife, has a right to a decree of divorce. In the second place, if the answer to this first point is in the affirmative, then the court must decide whether the decree is to be in favor of or against the wife.

Naturally, the first thing to be decided is the charge of adultery or adulteries against the husband. It will be observed that the Spanish laws on this point are hardly equitable or just. The least act of adultery on the part of the wife, in whatever form it be committed, gives the husband the right to obtain a divorce; but in order that a woman may divorce her husband on the ground of adultery, the act must have been committed with public scandal or with contempt for the wife. It is not necessary that both the scandal and the contempt for the wife result from the adultery; either of these motives is sufficient to require the court to grant the innocent spouse the remedy prescribed by the law. Although this court does not at all agree with the law and takes pleasure in stating that among the first laws passed

in the Island of Porto Rico under American sovereignty, there was one that annulled this provision and placed the husband and the wife on the same footing as they are considered in the laws of the United States, the court is aware of the fact that all of the in-
16 habitants of these Islands are governed by this law as it is established in the Spanish Civil Code, and if I were not convinced that the evidence clearly showed that the defendant in this suit is guilty of the crime of adultery, committed with public scandal or contempt for the wife, or with both, I should not hesitate for a moment in denying any remedy whatever to the wife.

To show the truth of the charges made in the allegation of the plaintiff touching this point, a short discussion of the evidence upon the subject will be sufficient. In the first place, it will be observed that when the defendant in his answer denied all the charges of adultery, the answer was not under oath, so therefore it is nothing more than a mere declaration. The defendant was directly asked if he had been faithful to his wife since their separation, to which he asked to be excused from answering because he had a right to be (page 154). This circumstance should not be considered and the court does not consider it as a confession of guilt of the defendant. The court decides the point according to the testimony of the witnesses that has not been refuted in the slightest by said defendant.

So that the court, in view of the evidence submitted, considers that the defendant has been living (since he was married) in open adultery with Antonia Guzman, and that he is the father of the child that was born in April, 1900. This is fully proven by the testimony adduced by the woman herself. It is evident that public
17 scandal resulted from this illegal union because, from the evidence appearing on page 4 of the testimony of the witnesses, she states that one time after she had ceased to have any relations with the man she went to visit him in his house in Iloilo for the purpose of speaking about the support of the child; that on that occasion she was maltreated by the defendant, who made use of a whip and told her in her own dialect that ^ that was the result of her imprudence in going to his house. She further swore that later she sent the child to the defendant's house because he, being rich, could support it better than she who was a poor woman. This occurred in August of last year and it is not denied by the defendant in any of his testimony. The testimony of this woman, moreover, is supported by that of her father, Antonio Guzman, who, among the many witnesses that testified, was one of the few that appeared to [have]* any display special intelligence and sincerity.

From the testimony of other witnesses it appear- that the defendant lived in open adultery with a woman named Salvación Confesor, in the town of Molo, near Iloilo, in the latter part of the year 1901. It has been proved that the defendant paid the rent of the house that this woman occupied and that he frequently visited her there. In corroboration of this fact, the testimony of the witness Clara Corc

[* Word enclosed in brackets erased in copy.]

(page 19) shows that the defendant, in the presence of a female child of the said Salvación that was born in the year 1901, said that he doubted if the child was his "because it was so dark". To my mind, this remark clearly indicates the existence of illegal
18 relations between the defendant and the said Salvación.

It further appears that in the year 1894, that is, two years after the husband and wife had lived together in the defendant's house, in the town of Talisay, where they had lived together for thirteen months as man and wife, a woman by the name of Gregoria Bermejo lived with him; that the people of the vicinity regarded this woman as the mistress of the house and that later she gave birth to a female child that is now 6 years old; that the defendant treated as
this child ∧ though it were his own daughter and that moreover there was a resemblance between the two; that the defendant used to send money to this woman by one of his employees. These declarations are to be found at pages 23 to 28 of the record.

From this uncontradicted testimony it is impossible to arrive at any other conclusion than that the defendant, not wishing to live with his legitimate wife and having had illicit relations with these three women, is guilty of adultery, committed with public scandal and contempt for the wife. If the latter can not be considered as contemned in being turned out of the husband's house and replaced by concubines who lived there as mistress of it, whose children are supported by the husband, then I can not conceive in what manner contempt can be displayed for a true and legitimate wife. Of course the burden of the proof is upon the husband to show the infidelity of the wife. As to my way of thinking the wife, the plaintiff herein, has been able clearly to prove the adultery committed by the husband, accompanied by public scandal or contempt for the
19 wife, or both circumstances, we will now pass to the consideration of the question as to whether the husband has been able to prove the adultery with which he charges his wife.

Among the few facts upon which the parties to this unfortunate suit agree, are the date of the marriage and that of their separation. They agree in that they were married on the 9th of July, 1891, and that they separated in the month of August of 1892, having thus lived together, maritally, for a period of thirteen months. The defendant agrees to all this (see page 142). The husband explains his determination to separate from his wife in August, 1892, on the ground that in that month he received a letter which purported to have been written by his wife and was addressed to her lover, Zabal. The husband swears that this letter was placed in his own hands by a woman named Apolonia Aurelio, who is the principal witness upon whom he relies to establish the adultery alleged. If the testimony of Apolonia is true, the wife has no right to any remedy of any sort.

It was, however, with the greatest care that I studied the testimony of this woman Apolonia, because it is the most important part of the proofs submitted by the defendant. It is true that there were other witnesses who positively testified to the acts of adultery committed by the wife with the lover Zabal in the town of Talisay during

the first part of the year 1892. But on cross-examination it was shown that these witnesses were too ignorant or depraved to
20 entitle them to have their testimony considered in any way.

For example, we will refer for a moment to the testimony of Eugenio Ventoso which appears at pages 113-116 and 132-135 of the record. This witness swears that on various occasions he saw Zabal climb up by the porch of the house and enter the room of the wife during the absence of the husband; that he knows that these things occurred in 1891 or 1892 but he can not say if that was more than a year before the trial or no. In page 133, he swears that he is sure that American soldiers were stationed in the town of Talisay at the same time as the husband and wife lived there and that he is as sure of that as he is of all the rest he has testified to. He is positive that these things occurred in 1891 or 1892, but he can not say what the present year is, nor how many days there are in a week or in a month, nor does he know what day of the week it was on which he was present in court. He also acknowledges that he knew that the corporal made his visits in the year 1891 or 1892 because the cook had told him so; the cook also testifies as one of the important witnesses for the defendant in this case. After studying the evidence adduced by witnesses similar to that of Eugenio, the court can not help thinking that some of it has been cooked. We will therefore pass by this disagreeable phase of the controversy and return to the witness Apolonia, who, in appearing to give her testimony in court, showed a greater degree of intelligence than the general run of the Filipino working class. Apolonia positively swears that the letter in question was given her by the wife of the defendant the evening before one Sunday in the year 1892, which day she described in the Visayan dialect by the word "Cayab" (page 82). There
21 arose a long discussion between the attorneys with respect to the true meaning of the word "Cayab." The defendant insists that it refers to Ascension day, while the plaintiff disputes it, claiming that it means Easter Sunday, or the Day of Resurrection. Nevertheless, the court decides this point in favor of the defendant and takes notice that the true interpretation of the word "Cayab" is Ascension Day. Both parties admit (page 150) that Resurrection Day in the year 1892 fell on the 17th of April; according to this, Ascension Day would have occurred on the 27th of May, and if we are to believe the testimony of Apolonia, the said letter (which, by the way, is an important piece of evidence adduced by the defendant, although he does not produce it, a point which will be discussed later on) was delivered to the defendant on the morning of the Monday following the said Sunday. The defendant swears that he received the letter from the woman Apolonia and that by its means he learned of the illicit relations between his wife and the man named Zabal; that he immediately accused his wife of adultery; that she admitted having written the letter and that after she had knelt before him and begged for his pardon he tore up and destroyed the letter (page 137). The husband testifies that he immediately had a conveyance prepared for his wife and that he took her to her parents' home in Valladolid, where he left her and refused thereafter to live with her.

The husband agrees that this took place in August, 1892. Apolonia is also sure that the delivery of the letter took place on the 28th of May, 1892. The wife positively denies the existence of the letter.

The testimony of this woman Apolonia is too uncertain
22 and too suspicious to justify any court in declaring the plaintiff guilty of adultery, especially when the worthlessness and the dubious character of the testimony of the other witnesses for the defendant on this subject increase the probability of the existence of something in the nature of a conspiracy to destroy the case of the plaintiff and support that of the defendant in the present case. There are other considerations in the evidence, as well as in the atmosphere of the court room and the demeanor of the parties during the trial, which inclined the court to believe at that time that the true facts of this case were with the plaintiff. A close study of the case in Manila, far from the place where the trial was held and in the calm and quiet I experienced in my library during a period of quarantine to which my house was subjected on account of a case of cholera having been discovered in it, confirm me in this belief. The defendant swears (page 138) that when the disgrace befell him that was uncovered by the contents of the letter, he thought of killing someone and almost at the same time he destroyed the letter; that if he had not caused it to disappear it would have been the best evidence that he could have possessed. As a ground for his action, and his attorney strongly presses the point, he relies on the contents of an authentic letter that was admitted in evidence, which his wife later sent him on the 6th of March, 1898, in which she says: "let fall down a drop of compassion from your soul; look at me back again with your cheerful eyes at the woman who is watching for you. I know well that

you are very disgusted with me, and for just reason—for
23 having claimed my pension. Be calm; quiet yourself; reflect for a moment my situation, which I will explain to you." Another paragraph of the letter says: "I keep yet on my face the shame of what has happened, notwithstanding that it has been already many years since we parted. Therefore, my husband, forgive me; erase what has happened; remember me for God's love; behold our dark fate; in you I trust my future". The defendant argues that by this letter the plaintiff confessed her guilt. A close study of this letter convinces me that that is not its true interpretation. To my mind it is the letter of a woman in despair at the continued desertion of her husband and who is willing to sacrifice her pride and almost her self respect if thereby she can again secure the company of the man who, to my mind, still loved her in spite of his dishonorable conduct toward her. The "shame" to which she refers in the letter may well mean that which she suffered when her husband deserted her, although without any reason. Besides, not a word was said in the testimony, nor did the defendant in any way intimate, that the plaintiff has conducted herself improperly since August, 1892, the date of their separation, that is, for a period of approximately ten years. After they ceased to live together they resided in houses that were only a few miles apart.

If the conduct of the plaintiff had been in any way improper and dishonorable, there is no doubt but that the defendant could have proved it. The case that the defendant tries to present is that of a young girl that marries at fourteen years of age, commits adultery at fifteen, for which reason she was dishonorably returned to her parents by her husband and afterwards deprived of his support and company, but who, nevertheless, has led an irreproachable life for ten years.

While the court does not pretend for a moment to fathom the mysteries of the heart of a woman, a problem that has puzzled wise men since the birth of time and which still remains unsolved, it appears to him absolutely improbable that these things could occur. If a woman or a young girl, happily married to a rich man who lives in greater luxury than anyone else in the neighborhood, deliberately receives the caresses of another man, and for that reason is turned out of the house by the husband and loses his support and affection, it seems to me that this change, as is natural, would perforce incline her to enter a life of immorality. In the present case we find the contrary. This court does not hesitate to say that the attitude of the plaintiff was such as to impress the court very favorably in her behalf. Not a particle of vindictiveness toward the man who, as she believes, has so unjustly treated her, was exhibited by her; her entire bearing was that of a modest, retiring, self-respecting, and conscientious woman. It seemed to me to be the case of a woman who, for many weary years, patiently waited for voluntary justice at the hands of a man whose duty it was, by all laws, human and divine, to come to her assistance, and who, when she found that she could expect nothing from him, appealed to the courts for justice as she undoubtedly had the right to do. The defendant is a man of uncommon intelligence. Nevertheless, his testimony contains many admissions which the court considers to be almost prejudicial to his defense. For example, he tries to show that the plaintiff is unworthy of credence because she made a mistake in her statement as to her age. The plaintiff said that she was thirteen years of age when she married. The truth is that she was fourteen, as she was born in 1877 and was married in 1891. At page 136, the defendant swears that he was 24 years old when he married and at page 141, that he was born in 1868. So that he was 23 years old and not 24 when he married, and while the court does not attach much importance to these mistakes it realizes that both parties are equally situated in that regard. The principal question in this case is that both litigants agree that they lived together as man and wife for the space of thirteen months. This is further confirmed by the statements of the mother of the plaintiff, who says that the husband brought his wife to her house in Valladolid in the month of August, 1892. At page 144 the defendant again swears that he and his wife slept in separate beds when they went to Valladolid to terminate their married life and when he took her from his own house in Talisay. The plaintiff and her mother swear that in the room that the couple occupied there at the time, there was only one bed, and the plaintiff states that at that time and place her

husband and she sustained marital relations. This last the defendant roundly denies. This point is of the greatest importance, because if it is true, it destroys the excuse of the husband for abandoning his wife. It also implies that whether or not he suspected his wife of infidelity, or whether or not she was guilty of it, he had pardoned her. Nevertheless, at page 167, the defendant
26 admits that he might be mistaken as to whether or not there were two beds in the room that they occupied. If any importance is to be attached to this statement, it will be seen that either the good faith of the plaintiff is greater than that of the defendant, or else his memory is less accurate than hers.

We will refer once more to the woman named Apolonia. Her testimony was at least positive, a thing that could not be said of most of the other witnesses of the defendant. She says that she served in the house of the spouses for five months, from the beginning of January of 1891 or 1892, she was not sure of the year (pages 86, 87). If her statement is at all true, it must have been in January of the year 1892, because in January, 1891, the litigating parties were not yet married. Consequently the five months ended in May, 1892, which was the same month in which occurred the Feast of the Ascension, and when she says she received from the wife the letter which the latter wrote to Zabal and which was given to the husband on the Monday following that day. The plaintiff and the plaintiff's mother both swore that this woman, Apolonia, never commenced to work for the plaintiff until after the year 1893, after the couple had separated, and that she was then sent by the husband to the wife as a servant. The wife also says that trouble arose between her and this woman, Apolonia, subsequent to 1893, by reason of the fact that Apolonia was about to marry a man whom the wife disliked. This statement is not denied by any of the defendant's witnesses. It therefore shows that a motive exists on the part
27 of this woman, Apolonia, to injure the wife. There is also evidence in the case tending to show that this woman, Apolonia, received a large sum of money shortly before the trial of this case, which money came from the defendant or some of his agents. The court, however, does not regard this testimony as of great importance, because it is too vague, but the other testimony is very important. The attitude of the woman, Apolonia, on the witness stand was apparently hostile to the plaintiff. This woman, at page 90, positively testifies that it was in the month of May that the defendant took his wife away from Talisay. If this woman's account is made in good faith it can not be correct; if, on the other hand it was made in bad faith, it is not wholly worthy of belief. So that from whatever point of view the case be regarded, the court, after taking into consideration all the foregoing, discredits the testimony of Apolonia, as well as that of the other witnesses who testified to the same effect and it finds that the defendant has not been able to prove according to the rules of evidence, any act of adultery committed by the wife. The court further decides that the said wife has a right to obtain a divorce according to article 104 of the Civil Code, based on the second paragraph, first *cause* of article 105 of the said Code.

Wherefore the Court understands that the wife comes within the provision of article 106 of the Civil Code which says "The innocent spouse only can petition for divorce," and that during the whole of these proceedings he is convinced that the defendant aban-
28 doned his wife simply because he was tired of her. He is a man of that unfortunate make up that is unable to maintain a permanent affection for any woman. His temperament is clearly one that makes him adopt as his principal guide in his relations with the fair sex, the well known proverb "variety is the spice of life." After he turned his legitimate wife out of the house he lived at different times with at least three concubines and taking into consideration the ages of his three illegitimate daughters (one had by each woman) one of six years, one of two years and seven months and the other seven months of age respectively, the conclusion is irresistible: he tires of his concubines almost as soon as he tired of his own wife. The advantage which the former had over his legitimate wife was perhaps due to that other old proverb "stolen fruits are sweetest."

The remaining question to be considered is as to the amount, character, source, and nature of the conjugal partnership property, the rules of law governing the separation or division of the same and the rights of the wife as against the husband which result from the decree of divorce granted in favor of the wife by this decision.

At the time of the marriage neither spouse was possessed of any substantial property, but both had wealthy fathers. The father of the plaintiff died on February 11th, 1899, leaving an estate worth, according to the defendant's statement, 70,400 pesos. But this statement is merely a memorandum signed by the attorney of the defendant, and no proof whatever has been adduced tending to establish its accuracy. The legal proofs in this case show that said
29 estate was valued by all the eight heirs, and by the widow, at 16,000 pesos, and that the plaintiff sold her share to the widow, her own mother, for 2,000 pesos. The defendant also files a statement, signed by his attorney, purporting to show that the plaintiff is worth 13,600 pesos in her own name, but he fails to offer any evidence as to the correctness thereof. The same, therefore, cannot be considered. The father of the defendant died early in 1897, or previous thereto, leaving an estate valued at 1,508,192 pesos equally divided among his four children, one of whom has died during the pendency of this action, so that the defendant is the owner of a one-third undivided interest in said estate as represented by the partnership known as "Hijos de la Rama," which partnership was duly created October 1st, 1897, and will expire October 1st, 1907. The details of this partnership and the value of the income derived by the defendant therefrom are necessary objects of discussion by the reason of the provisions of the Civil Code touching this subject. The Spanish law, as found in the Civil Code, provides a very elaborated and complicated scheme designating what class of property shall be regarded as belonging to the conjugal partnership and what shall not, as well as controlling the division thereof in case of a divorce. The different provisions of the Civil Code are not entirely clear, and Mr.

Sanchez Roman, one of the leading law-writers of Spain, whose commentaries on the Civil Code are considered unsurpassed, discusses, in Chapter 22 and Chapter 23 of Volume 5 of his studies on the civil law, the different provisions of the Civil Code upon
30 this subject, pointing out ambiguities and conflicts and laying down rules which should govern cases of this character. He goes into the most minute details. This court has given careful study and consideration to the views of this law-writer, believing him to be as good an authority as is available. His views have been adopted and applied by this court to the best of its ability in passing upon the rights of the parties.

Before discussing this question, it is proper to say that according to the practice which prevailed in the Philippine Islands previous to October 1st, 1901, the court in an action of divorce merely passed upon the question as to whether the divorce should be granted. After a decree of divorce had been granted by the court under the old practice a separate suit was necessary for the division or separation of the properties which might constitute the conjugal partnership. It is my opinion, however, that under the present practice no second suit is required, and this court has jurisdiction in the present proceeding to determine not only the question of divorce or no divorce, but also to pass upon the question of the rights of both parties as to the division or separation of the property of the conjugal partnership. This view, furthermore, is evidently entertained by the contending counsel in this case, as the plaintiff specifically prays for a division of the property and other relief of a similar character, and her attorneys have presented an elaborated argument on this point, and the defendant himself, in this answer, although he prays for a judgment of divorce in his favor, specifically waives his
31 consequent right to a separation of the conjugal partnership property by reason of his allegation that none exists.

It is unquestionable true that the property itself inherited by the wife from her deceased father, and by the husband from his deceased father, does not form any portion of the property of the conjugal partnership. According to the provisions of Article 1396 of the Civil Code

Aug. A these respective properties are considered as belonging to each of the spouses separately. This, however, has reference to the property itself, or which may be designated by the word capital. In other words, the husband would have no interest in the 2,000 pesos derived by the wife from her father's estate, nor would the wife have any share in the husband's interest in the estate left by his father. We turn, however, to Article 1392 of the Civil Code and we find a provision as follows: "By virtue of the conjugal partnership the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and the wife share and share alike upon the dissolution of the marriage." It has been thought by some law writers that the words, "dissolution of the marriage" did not refer to a judgment of divorce. It has been argued that a marriage under the Spanish law is not dissolved by a decree of divorce, because the result of a decree of divorce is simply

a judicial separation of the spouses, neither one being allowed to remarry without a special dispensation. It is my opinion, however, that this interpretation is incorrect. At page 872 of the 5th
32 Volume of Sanchez Roman, previously mentioned, is found his opinion that where a separation of the spouses is judicial*ly* and based upon the guilt of the husband, there must be applied the rule found in the second paragraph of Article 1436 of the Civil Code, which provides that in such case "the wife shall enter upon the administration of her own dowry, and of all further property which may have been awarded her as a result of the liquidation." This liquidation refers to the elaborate scheme of division of the conjugal property which had to be the subject of a separate suit under the old practice. Both sides having presented evidence as to the existence or supposed existence of property belonging to the conjugal partnership, it becomes the duty of the court to apply the same rules of law as would govern if a separate and subsequent suit between these parties had been instituted under the old practice, and the elaborate scheme of inventory had been adopted. In order to show that the words at the end of Article 1392, namely: "dissolution of the marriage," are applicable to a decree of divorce granted by a civil court, reference may be had to paragraph 27 of Chapter 23 of Sanchez Roman, wherein he recites seven civil results of a definite decree of divorce in regard to rights of property. The fourth result is found at the foot of page 924 of Volume 5, and the language is the same as that found in the second paragraph of Article 1436 of the Civil Code. It thus plainly appears that where the husband is the guilty party the wife is entitled to the sole administration of
33 her dowry and of all other property which may belong to her as a result of the liquidation of the partnership holdings.

It therefore being clearly established that, according to Article 1392, the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and wife share and share alike upon the dissolution of marriage; and furthermore that a decree of divorce granted by a Civil Court in favor of the wife brings her within the rule established by said Article 1392, the only remaining question to be considered is the amount which she shall receive from her husband, this being a judicial inquiry which would correspond to and take the place of an action for a liquidation under the old practice.

First, as to the property which the wife has contributed to the partnership holdings. The evidence shows that on August 13th, 1899, the plaintiff received from her mother the sum of 2,000 pesos, in consideration whereof the plaintiff granted to the mother all her rights as an heir of her deceased father. Her income or profits from this sum of 2,000 pesos must be estimated at the rate of six per cent per annum from the date the money was received, in the absence of any legal proof to the contrary. This sum computed to the date of this judgment amounts to 345 pesos, and under the law as previously set forth the same must be regarded as the portion contributed by the wife to the conjugal partnership.

Second, as to the defendant. The testimony shows (page 54)

that the net profits of the firm to which the defendant belongs
34 were, for the period ending June 30, 1900, $104,590.35 Mexican money. At the same page (we quote from the testimony of the book-keeper of said firm, Mr. Fortunato Fuentes, who was probably the most intelligent and trustworthy of all the witnesses who have declared in the present case) it is shown that the gross profits for the year ending June 30th, 1901, were $195,274.69, Mexican Money, of which amount the defendant personally received $9,763.73, which was five per cent thereof, as managing partner according to the terms of partnership, and the balance, $185,510.96, represented the sum which should be divided equally among the partners. The testimony of this book-keeper further shows, at page
56
[65],* that the profits for the year ending June 30th, 1902, are substantially the same.

The articles of co-partnership which are in evidence show that each partner is entitled to draw for expenses from the partnership profits the sum of 200 pesos per month, or 2,400 pesos a year. The partnership having commenced on October 1st, 1897, four years and nine months have elapsed up to the present time, and the income or receipts of the defendant from this source have amounted to 11,400 pesos. The articles of partnership further provide that the member of the firm who acts as managing partner shall receive two forms of special allowance or salary; one is fixed and definite whether the partnership makes money or not, and amounts to 450 pesos per month; the other is contingent, and amounts to five per cent of the profits. The evidence shows that the defendant became the active managing partner of this business in the month of February,
35 1899. This appears at page 62. The defendant therefore has received since February, 1899, up to the present time a fixed allowance at the rate of 450 pesos monthly, amounting to the sum of 12,600 pesos.

At page 49 it appears that the witness Fortunato Fuentes, the book-keeper of the house of the sons of de la Rama, testified that the profits per month were 450 pesos. This was either a mistake of the witness, the interpreter, or the stenographer. The entire testimony clearly shows that this sum of 450 pesos a month is a fixed allowance to the managing partner, according to the terms of the partnership papers, in addition to the 200 pesos a month which each partner receives, and the five per cent of the profits above mentioned.

The defendant, furthermore, must be charged with two items of 9,763 pesos and 73 cents each, being the five per cent of the gross profits for the two fiscal years of the partnership concern ending June 30th, 1901, and June 30th, 1902. These two sums amount to 19,527 pesos and 46 cents. The plaintiff's attorneys insist that the court should charge the defendant with five per cent upon the net profits of the partnership for the period commencing October 1st, 1897, and ending June 30th, 1900, which, as before

[*Figures in brackets erased in copy.]

stated, amounted to 104,590 pesos and 35 cents. This, however, should not be permitted, because the evidence shows that this defendant was not the managing partner of the concern during the entire period represented by that amount. It is true that he was the managing partner during a portion of that period, but the plaintiff's attorneys not having presented any proof to the court as to the portion of those net earnings which were acquired
36 during the time of the administration of the affairs of the partnership by the defendant, the court can make no estimate of the same. It is possible that all these profits arose between October 1st, 1897, and February 1899, when the defendant returned to Iloilo from Europe. On the evidence as it stands the court feels itself obliged to exclude all claims arising from a sup-
of P104,590.35
Aug. posed five per cent allowance upon this amount ∧. Furthermore, plaintiff's counsel in their brief set forth that it is the duty of this court to divide the sum of 475,612 pesos and 27 cents (which is made up of three items, namely: $104,510.35, net profits up to June 30th, 1900; second, $185,510.96, net profits for the year ending June 30, 1901; and third, $185,510.96, net profits for the year ending June 30th, 1902) by three, because at the present time there are only three members of the partnership, one of the brothers having died during the present year, and counsel argue that it must be presumed that he died intestate because no proof whatever has been adduced to the contrary, and the theory of the attorneys for the plaintiff is that the defendant has inherited equally with his surviving brothers the interest of the deceased brother in all the partnership property. The court, however, is unable to accede to this view. Even assuming that the deceased brother died intestate, and that the defendant inherits equally with the two surviving brothers, can it be legally inferred that this deceased brother did not spend all of his income and leave nothing but capital? Furthermore, assuming that his interest in the profits of the partnership remain intact, that portion of his profits
37 which would pass to the defendant as an heir of the deceased could not be regarded as profits or income derived from the partnership property itself. It would be in the nature of an inheritance and should be regarded as capital rather than income, and hence should form no part of the goods or property of the conjugal partnership between the plaintiff and the defendant. Therefore, this sum of 475,612 pesos and 27 cents should be divided by four instead of by three. The true quotient is thus found to be 118,903 pesos and 7 cents. Adding together said sums of $118,-903.07, $11,400, heretofore shown as the absolute income of the defendant at 200 pesos a month, and the further sum of $12,600, shown to be his extra allowance of 450 pesos a month since his return from Europe, and the further sum of $19,527.46, shown to be his extra allowance as managing partner, based upon five per cent of the net profits for the past two years, we find a total of $162,430.53, which I consider as the true amount chargeable to the defendant as derived by him in the nature of income or profits

and forming his part of the goods of the conjugal partnership between himself and wife. The income of the wife has been shown to be 345 pesos, applying the same rules to her financial condition as have been applied to that of the husband. The total value, therefore, of the conjugal partnership existing between the plaintiff and defendant in the present case amounts to 162,775 pesos and 53 cents. The words of the statute say that the same must be divided share and share alike. This means that each should have 81,387 pesos and 76 cents. The wife already having in her pos-
38 session 345 pesos of this sum, she is therefore entitled to receive from the husband 81,042 pesos and 76 cents, as being the sum necessary to equalize the holding of the property which, according to the statute, must be regarded as belonging to the conjugal partnership.

This amount is very much less than the claim of the plaintiff's counsel. They ask for an allowance to the wife of the 181,000 pesos. A small portion of this difference of 100,000 pesos arises by a proposed division of firm profits by three instead of by four, as already explained. The larger portion of this difference is made up of various items representing valuable steamers, lighters, etc., standing in the name of defendant, or sold by him in his name alone; also various tracts of real estate, recently acquired, increases in value of certain real estate previously owned, improvements on sugar plantations, and so forth. These elements of wealth urged by plaintiff's counsel have been eliminated from my calculation for three reasons: first, because the evidence shows or tends to show that some of these items are merely the forms in which the profits of all the members of the firm were invested; second, because the evidence shows that the transactions in the name of the defendant alone must legally be regarded as being for the benefit of the firm owing to a stringent clause in the articles of co-partnership; and, third, because the balance of these items must be considered as an "unearned increment" of the value of the capital of the firm and hence a part of the capital, and not, legally speaking, any part of "income or profits."

39 The plaintiff's attorneys pray for an allowance to be made by the court payable by the defendant to the plaintiff for her support during the pendency of this action and for the fees due them. I find no provision in the present law whatever allowing the latter item, except the nominal sum of 28 pesos fixed by Section 492 of the new Code, as part of the costs. As regards the former, I consider 400 pesos per month, which would be very nearly the interest at six per cent on the value of the wife's interest in the property of the conjugal partnership as now fixed by the court, a proper amount to be allowed her. The defendant certainly cannot consistently complain at being obliged to pay his lawful wife 400 pesos per month when the testimony shows that he made it his custom to pay concubine Number Two 100 pesos per month, besides food, clothing, house and servants. (See Trans. pages 12 and 13.) This suit has been pending eight months, and the court therefore grants as an allowance due from the defendant

to the plaintiff for her support during the pendency of this action the sum of 3,200 pesos.

It is therefore considered and adjudged by the Court as follows:

First. The marriage relations heretofore existing between the plaintiff Agueda Benedicto de la Rama and the defendant, Esteban de la Rama, are hereby declared suspended in accordance with the provisions of Article 104 of the Civil Code.

Second. This judgment of divorce is granted in favor of the plaintiff and against the defendant, and based upon the
40 second paragraph of Section 1 of Article 105 of the Civil Code, because the court finds that the defendant has committed adultery, accompanied by public scandal and disgrace of the plaintiff as a direct result of such adultery.

Third. It is hereby ordered, adjudged and decreed that the defendant, Esteban de la Rama, do pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $81,042.76, Mexican money due her as her unpaid share of the property belonging to the conjugal partnership heretofore existing between them and dissolved by virtue of this decree.

Fourth. It is further ordered, adjudged and decreed by this Court that the defendant, Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $3,200, Mexican money, as an allowance for her support as his lawful wife since October 31st, 1901, the date upon which this action was instituted, being at the rate of 400 pesos a month for eight months.

Fifth. It is further ordered, adjudged and decreed by this court that the defendant, Esteban de la Rama, pay the costs of this action.

Sixth. It is further ordered that the clerk of this court call the attention of the Fiscals of the provinces of Iloilo and Occidental Negros to this decision and to the testimony on file in this action, it being my opinion that the said Esteban de la Rama has been guilty in each province of violating Article 437 of the Penal Code.

41 Manila, July 5, 1902.

ARTHUR F. ODLIN,

Judge of the Court of First Instance, City of Manila, Part II, Sitting as Special Judge of the Court of First Instance for the Province of Iloilo.

To that decision the defendant filed the present exception and assigned the following reasons:

First. In that the said decision holds that the acts of adultery charged against the defendant to have been proven, contrary to the evidence adduced at the trial.

Second. In that, granting as a hypothesis only that these acts of adultery were committed, it finds that they occasioned public scandal and contempt for the dignity of the wife, when the evidence presented at the trial clearly show that these circumstances, required by the law to be proven in order that the adultery of the husband constitute sufficient reason for a divorce, did not exist.

Third. In that it held that the adultery of the plaintiff, which was the cause of the separation of the spouses, was not proven; this in the face of the evidence submitted by the defendant which fully proved that the said adultery did take place.

Fourth. In that it holds that the earnings and profits received by the defendant during the time he was separated from the plaintiff by reason of the adultery of the latter, constitute conjugal property and in holding that the plaintiff was entitled to one-half thereof.

42 Fifth. In that it decides and orders in the present suit the assessment of value and the partition of the supposed conjugal property, a matter which ought to be the subject of separate proceedings, and which, furthermore, was neither asked for by the plaintiff nor discussed at the trial.

Sixth. In that it decides that one-half of the profits and earnings arising from the business transactions of the firm of Hijos de I. de la Rama amounts to the sum of P81,042.76, Mexican currency, without having first properly liquidated the business of the said firm and taken a balance and in that it only took into account the assets and not the debits or the losses which the said Hijos de I. de la Rama suffered in their properties.

Seventh. In that it holds and decrees that the plaintiff has a right to civil support and in that it fixes the amount thereof in the sum of P400 monthly.

Eighth. In that, though the Penal Code is in force, it orders the clerk to inform the fiscals of Iloilo and Negros of and furnish them with copies of the decision and the testimony of record, because the matters referred to, even if true, do not constitute a crime, still less a public one.

Wherefore, on filing this bill of exceptions and the documents asked for, the defendant prays the court to certify it and forward it to the Supreme Court in Manila, to which court the defendant appeals from the said judgment.

Iloilo, July 25, 1912.

JUVITO YUSAY,
Attorney for the Defendant.

43 I certify that the foregoing bill of exceptions was filed by Attorney Yusay.

Iloilo, July 25, 1902.

LICERIO CASTEN SALAZAR, *Clerk.*

Heading and Title.

To the defendant and to Don Jovito Yusay, his attorney, Greeting:

You are hereby notified that the plaintiff will ask the Court to amend the proposed bill of exceptions as follows:

Page 55, line 14: in the place of the words "what are the profits per month?" it should read, "What is the monthly salary of the defendant?"

Page 58, line 19: in place of "P8000" it should read "8000 pounds sterling."

Page 59, line 17; in place of "P384,679.22" it should be "P384,-879.22."

Page 59, line 19: in place of "P19,555.64" it should read "P19,-575.64."

Page 60, line 1: After the words "one only" there should follow "24,000."

Page 60, line 7: in the place of "P2,500" it should read "P25,000."

Page 60, line 8: after the amount "P15,000" there should follow "warehouse on the wharf, number 19, P18,000. Warehouse on the wharf, number 20, P31,000."

44 Page 60, line 18: in place of "P140,590.35," it should read, "P104,590.35."

Page 60, line 25: in place of "P35,054.94," it should be "P39,-054.94."

Iloilo, August 4, 1902.

AYLETT R. COTTON,
L. D. HARGIS,
Attorneys for the Plaintiff.

The defendant agrees to the amendments proposed by the plaintiff and renounces any other notification or service on the subject.

JOVITO YUSAY,
Attorney for the Plaintiff.

NOTE.—I certify that the foregoing was filed on this fourth day of August, 1902.

LICERIO CASTEN SALAZAR, *Clerk.*

The foregoing bill of exceptions, together with the amendments proposed by the attorney for the plaintiff and appellee, was presented to me here in Manila, this 12th day of August, 1902. I approve the said bill of exceptions with the said amendments and allow and subscribe the same as the official bill of exceptions in this case in order to perfect the appeal prayed for by the appellants.

In witness whereof I place my hand this 12th day of August, 1902, in the city of Manila, P. I.

ARTHUR F. ODLIN,
Judge of the Court of First Instance of Manila, Sitting as Special Judge in the Above-entitled Case.

45 I, Licerio Casten Salazar, clerk of the Court of First Instance of Iloilo, certify that I have examined the foregoing bill of exceptions filed by Attorney Jovito Yusay, representing Esteban de la Rama in the divorce proceedings brought against the latter by Mrs. Agueda Benedicto, and that I have compared it with the original and found it to agree therewith.

In witness whereof I have issued this certificate, duly stamped with the seal of the Court of Iloilo, this 13th day of September, 1902.

LICERIO CASTEN SALAZAR, *Clerk.*

Received the foregoing document this 25th day of September, 1902, together with the papers accompanying it.

Certified.

F. C. FISHER,
Clerk Supreme Court,
By E. H. COLE,
Deputy.

As an additional bill of exceptions there was filed the following

Motion.

Comes now the defendant and sets forth:

1. That in the above-entitled case the following judgment was rendered:

46 "First. The marriage relations heretofore existing between the plaintiff Agueda Benedicto de la Rama and the defendant, Esteban de la Rama, are hereby declared suspended in accordance with the provisions of Article 104 of the Civil Code.

Second. This judgment of divorce is granted in favor of the plaintiff and against the defendant, and based upon the second paragraph of Section 1 of Article 105 of the Civil Code, because the court finds the defendant has committed adultery, accompanied by public scandal and disgrace of the plaintiff as a direct result of such adultery.

Third. It is hereby ordered, adjudged and decreed that the defendant, Esteban de la Rama, do pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $81,042.76, Mexican money due her as her unpaid share of the property belonging to the conjugal partnership heretofore existing between them and dissolved by virtue of this decree.

Fourth. It is further ordered, adjudged and decreed by this Court that the defendant, Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $3,200, Mexican money, as an allowance for her support as his lawful wife since October 31st, 1901, the date upon which this action was instituted, being at the rate of 400 pesos a month for eight months.

Fifth. It is further ordered, adjudged and decreed by this

47 Court that the defendant, Esteban de la Rama, pay the costs of this action.

Sixth. It is further ordered that the clerk of this court call the attention of the Fiscals of the provinces of Iloilo and Occidental Negros to this decision and to the testimony on file in this action, it being my opinion that the said Esteban de la Rama has been guilty in each province of violating Article 437 of the Penal Code."

2. That the defendant excepted thereto within the time allowed by law.

3. That without prejudice to the said exception and while offering to file the bill of exceptions within the time prescribed by law, the defendant, by virtue of the authority contained in section 497 case 3, of the Code of Civil Procedure, prays for a new trial on the

grounds that the findings in the said judgment are contrary to the weight of the evidence presented at the trial.

Wherefore he prays the court to order a new trial of this case.

Iloilo, 21st of July, 1902.

JOVITO YUSAY,
Attorney for the Defendant.

Heading and Title.

Order Denying the Motion for a New Trial.

The undersigned judge, after having received, read and studied the petition dated the 11th instant, signed by the attorney for the defendant, in which he prays for a new trial in the above-
48 mentioned case, is of the opinion that the judgment already rendered and signed in this case against the defendant is legal, proper and just; and that the attorney for the said defendant has not shown sufficient reasons for granting the new trial he asks for.

Wherefore the motion should be and is hereby denied.

Manila, August 30, 1902.

ARTHUR F. ODLIN,
Special Judge.

The defendant excepts to this decision of the court because he insists that the findings contained in the judgment upon the facts held to be proven, are contrary to the evidence, as he believes he has shown in his argument. He refers to the latter without prejudice to amplifying it later.

Iloilo, September 23, 1902.

JOVITO YUSAY,
Attorney for the Defendant.

On the 17th of October, 1902, the additional bill of exceptions was duly admitted, forwarded to the Supreme Court of the Philippine Islands, and received by the Clerk *on* the Court on the 10th of November, 1902.

Counsel for the defendant filed with his brief in that Court the following assignments of error:

First. The court, in finding the various acts of adultery charged against the defendant to have been proven, did not properly
49 consider the weight of the evidence adduced.

Second. Nor did he give the testimony its proper value when he found that (allowing as a hypothesis that the said acts of adultery took place) there concurred the circumstances of public scandal and contempt for the dignity of the wife.

Third. Equally erroneous is the finding of the court in holding that the adultery of the plaintiff was not proven, contrary to the weight of the evidence presented in the case.

Fourth. He also erred in holding to be conjugal property the earnings and profits obtained by the defendant while he was sepa-

rated from the plaintiff; and in holding that the plaintiff is entitled to one-half, notwithstanding the adultery committed by her, he violates article 73 of the Civil Code.

Fifth. By the action of the court in allowing the assessment of value and the division of the supposed conjugal property, he violated article 1418 and others of the Civil Code.

Sixth. He erred in fixing the value of the half of the supposed conjugal property in the sum of P81,042.75, without taking into account the antecedents and necessary data, and without moreover, taking into account the losses suffered and the debts contracted by the firm of Hijos de I. de la Rama.

Seventh. He violated the provisions of article 73 of the Civil Code in holding that the plaintiff was entitled to civil support and in fixing the amount of that support in the sum of P400 per month, when the plaintiff has no right to even support in kind.

Eighth. The court erred in applying article 437 of the Penal Code to the various acts of adultery imputed to the defendant and he violated the said article in ordering that the defendant be prosecuted do oficio therefor.

January
Aug. Manila, [February] 2, 1903.

JOVITO YUSAY &
LEDESMA & SUMULONG.

On the 16th of May, 1903, the Supreme Court of the Philippine Islands rendered a judgment in this case which judgment is to be found on page 34 of Volume 3 of the Philippine Reports.

On December 1, 1903, the appellee filed in the office of the Clerk of the Supreme Court the following petition:

In the Supreme Court of the Philippine Islands.

No. 1056.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff and Appellee,
vs.
ESTEBAN DE LA RAMA, Defendant and Appellant.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Philippine Islands:

The appellee, Doña Agueda Benedicto de la Rama, by her attorneys and counsel respectfully asks for a rehearing of this case, which was decided on December 8th, 1903, and in support of this motion presents the following reasons:

The effect of the decision in holding valid, and in full force and effect the Royal Order of December 29th, 1889, suspending titles IV and XII, of the Civil Code, will be far-reaching and most disastrous.

The Court has, in effect, held in the case of Yangco vs. Rohde, decided Oct. 13, 1902, that title IV of the Civil Code was in effect in the Philippines.

We submit that the decision of Mr. Justice Willard, upon which it is based, practically determining for all time, if allowed to stand, that the appellate court will retry questions of fact and reverse the decision of the lower court where there is merely a conflict of evidence and there exists sufficient evidence to sustain the findings of the trial court, should be reconsidered.

Sec. 497 of the Code of Civil Procedure provides that the Supreme Court shall not review the evidence taken in the court below, nor retry the questions of fact except as provided therein and the only provision applicable to this case, we submit, is part 3 of sec. 497, which is as follows:

If the excepting party filed a motion in the court of First Instance for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence and the judge overruled said motion, and due exception was taken to his over-
52 ruling the same, the Supreme Court may review the evidence and make such findings upon the facts and render such final judgment as justice and equity require.

The motion presented by the appellant for a new trial does not set forth the ground that the findings of fact were plainly and manifestly against the weight of evidence, and we submit the evidence should not have been reviewed.

The question is one which has been settled for all time in the appellate courts of the United States, and a few of such decisions are before the court, in appellee's brief, and in effect has been so held by this court.

(The Philippines Sugar Estates Development Co. vs. Victoriano del Rosario, decided October 31st, 1903; Vicente W. Pastor vs. Manuel Gaspar et al., decided October 23rd, 1903.)

We submit further that even if the court holds that the appellee was guilty of adultery, the offense was condoned. The trial court made no finding on this point for the reason that after personally seeing all the witnesses, and listening to their testimony and noting their deportment while testifying, he was entirely satisfied that the appellee was not guilty of any offense and consequently there was nothing to be condoned.

A condonation of an offense is the granting of a pardon and to pardon a party is to establish him to the same rights as he enjoyed before the crime or offense was committed.

53 When the said cause was presented to the court and argued, very little time was devoted to the facts, other than to support the points of law involved, as counsel felt secure in the position that the court would not retry the questions of fact and reverse a decision where there was substantial evidence to sustain the findings of the trial court, and we therefore pray that a further opportunity be granted us in which to present the facts and more fully explain the points of law involved.

Respectfully submitted.

A. R. COTTON AND
LIONEL D. HARGIS,
Attorneys for Appellee.

Filed in the Clerk's Office of the Supreme Court of the Philippine Islands on the 1st day of December, 1903.

F. C. FISHER, *Clerk*,
By J. E. BLANCO, *Deputy*.

To the foregoing petition the Supreme Court rendered the following decisions:

UNITED STATES OF AMERICA,
Philippine Islands:

Supreme Court of the Philippine Islands.

MANILA, P. I., December 22, 1903.

54 Messrs. Cotton and Hargis.

GENTLEMEN: This Supreme Court in the session of yesterday decided the following:

"The clerk of the court having informed the court of a petition filed by Messrs. Aylett R. Cotton and Lionel D. Hargis, in behalf of Doña Agueda Benedicto de la Rama, to the effect that she be allowed to present a statement of facts explaining the points of law involved, the court said: It is overruled."

Very respectfully,

F. C. FISHER, *Clerk*,
By H. D. McGEORGE, *Deputy*.

Supreme Court of the Philippine Islands.

AGUEDA BENEDICTO, Plaintiff and Appellee,
vs.
ESTEBAN DE LA RAMA, Defendant and Appellant.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the Philippine Islands and to Don Esteban de la Rama, appellant, and to his attorneys, Messrs. Ledesma, Sumulong and Quintos:

You are hereby notified that Doña Agueda Benedicto de la Rama, the appellee in the above entitled cause, begs leave to present and file this her exception to the decision of this honorable Court,
55 registered on the 8th of December 1903, reversing the judgment of the trial court, and

To the order on the 22 day of December, 1903, denying said appellee's petition for rehearing of said cause.

Manila, P. I., December 31st, 1903.

A. R. COTTON AND
LIONEL D. HARGIS,
Attorneys for Appellee.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

AGUEDA BENEDICTO DE LA RAMA
vs.
ESTEBAN DE LA RAMA.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the Philippine Islands and to Don Esteban de la Rama and to his attorneys, Ledesma, Sumulong and Quintos:

You are hereby notified that Doña Agueda Benedicto de la Rama, the appellee in the above entitled action, asks the permission of the court to file this her exception to the decision rendered by this court of January 18th, 1904, reversing the judgment of the Court of First Instance of Iloilo.

Manila, January 18, 1904.

A. R. COTTON.
LIONEL D. HARGIS.

56 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff and Appellee,
vs.
ESTEBAN DE LA RAMA, Defendant and Appellant.

Agueda Benedicto de la Rama, the above named plaintiff and appellee, feels herself aggrieved by the decision, order and decree made and entered in the above entitled cause on the 8th day of December, 1903, wherein and whereby it was ordered, adjudged and decreed that within forty days from the filing of said decision, judgment be entered reversing the judgment of the Court of First Instance of the Province of Iloilo, Island of Panay, P. I., which judgment, so reversed, is hereto attached, marked "A" and made a part hereof, and hereby petitions the said court for an order allowing said complainant to prosecute an appeal from said decree to the Supreme Court of the United States, under and according to the laws of Congress and the Statutes of the United States in such cases made and provided.

This petition is based upon the record of said cause in this court and affidavit hereto attached, which show that the right to property of the value of more than Twenty-Five Thousand Dollars is
57 involved, and for the reasons specified in the assignment of errors as follows:

I.

The Supreme Court erred in finding that "the Plaintiff, in the

summer of 1902, at Talisay, in the Province of Occidental Negros, committed adultery with one Zabal, a corporal of the civil guard".

II.

The Court erred in holding that the evidence was insufficient to sustain the findings of facts made by the trial court.

III.

The Court erred in reversing the findings of facts made by the trial court.

IV.

The Court erred in reversing the judgment of the Court of First Instance.

V.

The Court erred in holding that the plaintiff was not entitled to any relief.

The petitioner will ever pray.

LIONEL D. HARGIS &
AYLETT R. COTTON,
Attorneys for Petitioner.

COUDERT BROTHERS,
Of Counsel.

58 (EXHIBIT "A.")

It is therefore considered and adjudged by the Court as follows:

First. The marriage relations heretofore existing between the plaintiff Agueda Benedicto de la Rama and the defendant, Esteban de la Rama, are hereby declared suspended in accordance with the provisions of Article 104 of the Civil Code.

Second. This judgment of divorce is granted in favor of the plaintiff and against the defendant, and based upon the second paragraph of Section 1 of Article 105 of the Civil Code, because the court finds that the defendant has committed adultery, accompanied by public scandal and disgrace of the plaintiff as a direct result of such adultery.

Third. It is hereby ordered, adjudged and decreed that the defendant, Esteban de la Rama do pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $81,042.76, Mexican money due here as her unpaid share of the property belonging to the conjugal partnership heretofore existing between them and dissolved by virtue of this decree.

Fourth. It is further ordered, adjudged and decreed by this Court that the defendant, Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $3,200, Mexican money, as an allowance for her support as his lawful wife since October 31st,

1901, the date upon which this action was instituted, being at the rate of 400 pesos a month for eight months.

59 Fifth. It is further ordered, adjudged and decreed by this court that the defendant, Esteban de la Rama, pay the costs of this action.

Sixth. It is further ordered that the clerk of this court call the attention of the Fiscals of the provinces of Iloilo and Occidental Negros to this decision and to the testimony on file in this action, it being my opinion that the said Esteban de la Rama has been guilty in each province of violating Article 437 of the Penal Code.

Manila, July 5, 1902.

(S'g'd) ARTHUR F. ODLIN,
Judge of the Court of First Instance, City of Manila, Part II, Sitting as Special Judge of the Court of First Instance for the Province of Iloilo.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

PHILIPPINE ISLANDS,
City of Manila, ss:

H. D. C. Jones, of lawful age, being duly sworn, deposes and says:—That he is the agent in charge of the Manila branch of the Hong Kong and Shanghai Banking Corporation; that he has had many years' experience in exchange banking in the City of Manila; that he knows the value in United States Currency of Mexican

60 Currency; that he knows what the value of Mexican Currency was on the 5th day of July, 1902, and now is; that the sum of $81,042.76, Mexican Currency, was on July 5, 1902, and now is, of a value of more than $25,000, United States Currency.

H. D. C. JONES.

Subscribed and sworn to before me this 3rd day of March 1904, after having exhibited to me his personal cedula No. A121285 issued by the Assessor and Collector of the City of Manila on the 3rd day of April, 1904.

CHARLES C. COHN,
Notary Public.

Commission expires January 1st, 1905.

Before the Honorable Justice of the Supreme Court of the Philippine Islands.

AGUEDA BENEDICTO, Plaintiff and Appellee,
vs.
ESTEBAN DE LA RAMA, Defendant and Appellant.

To the Clerk of the Supreme Court of the Philippine Islands:

On petition of counsel for plaintiff and appellee, it is ordered that an appeal to the Supreme Court of the United States of America from the final decree and judgment heretofore filed and entered herein be, and the same hereby is, allowed; and that a certified transcript of the record, testimony, stipulations, and all proceedings herein be forthwith transmitted to said Supreme Court of the United States of America.

It is further ordered that a bond on appeal be fixed at the sum of Five Hundred (500) Dollars, U. S. Currency, for costs and damages on appeal.

Manila, P. I., April 2, 1904.

(S'g'd) CHARLES A. WILLARD,
One of the Associate Justices of the Supreme Court of the Philippine Islands.

UNITED STATES OF AMERICA,
Philippine Islands:

In the Supreme Court of the Philippine Islands.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff and Appellee,
vs.
ESTEBAN DE LA RAMA, Defendant and Appellant.

Know all men by these presents, that we, Agueda Benedicto de la Rama, as principal, and John W. Haussermann and Charles C. Cohn, as sureties, are held and firmly bound unto Esteban de la Rama, in the full and just sum of Five Hundred (500) Dollars U. S. Currency, to be paid to said Esteban de la Rama, his attorneys executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of April in the year of Our Lord One Thousand Nine Hundred and Four.

Whereas, lately at a session of the Supreme Court of the Philippine Islands, in a suit pending in said court between Agueda Benedicto de la Rama, plaintiff and appellee, against Esteban de la Rama, Defendant and appellant, a judgment and decree was rendered against the said Agueda Benedicto de la Rama, and the said Agueda Benedicto de la Rama having obtained from said Court an order

allowing an appeal to the United States Supreme Court to reverse the judgment and decree of the aforesaid suit,

Now, the condition of the above obligation is such that if the said Agueda Benedicto de la Rama shall prosecute the said appeal to effect, and shall answer all damages and costs that may be awarded against her, if she fails to make her plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

[SEAL.] AGUEDA BENEDICTO DE LA RAMA,
By LIONEL D. HARGIS, *Her Attorney.*
[SEAL.] JOHN W. HAUSSERMANN.
[SEAL.] CHARLES C. COHN.

Sufficiency of sureties on the foregoing bond approved this
63 2nd day of April, 1904.

CHARLES A. WILLARD,
Associate Justice, Supreme Court of the Philippine Islands.

Filed in the clerk's office of the Supreme Court of the Philippine Islands this 5 day of April, 1904, 11 a. m.

J. E. BLANCO, *Clerk,*
By H. D. McGEORGE,
Deputy Clerk.

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff and Appellee,
vs.
ESTEBAN DE LA RAMA, Defendant and Appellant.

I, J. E. Blanco, Clerk of the Supreme Court of the Philippine Islands, do hereby certify, in compliance with the order of the Honorable Charles A. Willard, Justice of this Court, dated March 2nd, 1904, that the foregoing is a true copy and correct transcript of the record, testimony and all proceedings had in the above entitled action.

In witness whereof I have hereunto set my hand and the seal of this Court, this thirtieth day of July, 1904.

[Seal Corte Suprema, Islas Filipinas.]

64 (Sgd.) J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Esteban de la Rama and to Ledesma, Sumulong and Quintos, his attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States of America, to be held at the city of Washington in the District of Columbia, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Philippine Islands, wherein Agueda Benedicto de la Rama is plaintiff and appellant and Esteban de la Rama is defendant and appellee, to show cause, if any there be, why judgment in said appeal should not be corrected and speedy justice should not be done the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this 17th day of August, 1904, and of the Independence of the United States the one hundred and twenty eighth.

E. FINLEY JOHNSON,
Associate Justice of the Supreme Court of the Philippine Islands.

65 Attest:

[Seal Corte Suprema Islas Filipinas.]

J. E. BLANCO,
Clerk of the Supreme Court of the Philippine Islands.

Service of the above citation is hereby acknowledged this 17th day of August, 1904.

LEDESMA, SUMULONG & QUINTOS,
Attorneys for Esteban de la Rama.

Endorsed on cover: File No. 19,476. Philippine Islands Supreme Court. Term No. 102. Agueda Benedicto de la Rama, appellant, vs. Esteban de la Rama. Filed September 22nd, 1904. File No. 19,476.

The case being taken to the Supreme Court of the United States, the said Court rendered a decision which is reported in 201 U. S., 303, and at page 746 of Vol. 11, Phil. Reps.

The case was returned to the Supreme Court of the Philippine Islands, whereupon the said Tribunal rendered a decision thereon which is to be found at page 745 of Vol. 7 of Phil. Reps.

By virtue of this judgment evidence was taken in the Court of First Instance of Iloilo. This was the same evidence as was taken at the first trial and in addition thereto the defendant presented the following witnesses: José Villanueva, Eduardo Lumaban, Esteban

Clavel, Claudio Villanueva, Nicomedes Marcolino, Felix
66 Gomez, Eusebio Rigolo, Sinforosa de la Torres, Esteban de la Rama (in his own behalf), Martino Ferrer and Vicente Garcia. The plaintiff produced the following witnesses: P. Q. Rothrock, Agueda Benedicto (in her own behalf) Agueda Benedicto (again) Fortunato Fuentes, Fortunato Fuentes (again) and Fortunato Fuentes (once more). In addition to this additional testimony the following exhibits were filed: By the plaintiff, Nos. 4, 5, 6 and 7; by the defendant, exhibits A, B, C, D, E, F, G, H, I, J, K, L, M and N. The testimony of the said witnesses, together with the exhibits referred to are attached to this bill of exceptions, as are the proofs submitted at the first trial. Other than these, no proofs were presented.

After consideration of these proofs, the Court rendered the following decision:

Decision.

This case has been before the courts for a long period of time and has passed from the trial to the higher and then the highest court and then back for further trial of certain parts. It might be well to give first a brief résumé of its prior course, as explanatory in part at least of how and why this decision is rendered.

This action was commenced in the Court of First Instance of Iloilo on October 30, 1901 by plaintiff filing her demand charging abandonment and adultery against her husband, the defendant, and praying for a divorce, the division of the conjugal property and alimony pendente lite.

67 The defendant in his answer denies his adultery, charges adultery against his wife, denies the existence of any conjugal property, and alleges that his only income is a salary of P450 per month received as manager of the firm of "Hijos de I. de la Rama."

After the trial of the cause before the Court of First Instance of Iloilo a decision was rendered on July 5, 1902, granting a divorce to plaintiff against defendant, dissolving the conjugal partnership, giving a judgment in favor of plaintiff for P81,042.76 as her share of the conjugal property, and allowing her P3,200 as alimony.

The defendant appealed from this decision to the Supreme Court of the Philippine Islands, where in December, 1903, that Court reversed the decision of the trial court on the grounds that the evidence showed that both plaintiff and defendant had committed adultery and that neither was entitled to divorce. The only thing the Supreme Court said in this decision relative to the judgment of the trial court regarding the conjugal property was that this decision of theirs made it unnecessary for them to consider that part of the judgment which relates to the settlement of the conjugal partnership.

From this decision the plaintiff appealed to the Supreme Court of the United States—this appeal being granted, based upon the fact that the property involved, the conjugal interests in contro-

versy, exceeded in value the sum of twenty-five thousand dollars and therefore gave the Supreme Court of the United States
68 jurisdiction over and the right to re-examine the whole cause. In finding that it has jurisdiction of this case it says in its decision:—

"By the decree of the Supreme Court, (meaning that of the Philippine Islands), she was denied all recovery of any description, upon the ground of her adultery. If upon a review of the testimony it were found that she was not guilty of adultery, she would unquestionably be entitled to one-half of the conjugal property."

And again it says in its decision:—

"Our conclusion upon this branch of the case is that the appeal was properly taken, and that it calls for a re-examination of the grounds upon which the petition for a separation of the conjugal property and alimony pendente lite was denied."

In this decision (De la Rama vs. De la Rama, 201 U. S., 303), the Supreme Court of the United States reverses that of the Philippine Islands, saying:

"We have reached the conclusion that there is no such preponderance of evidence in favor of the theory of the plaintiff's guilt, as authorized the Supreme Court to set aside the conclusion of the Court below upon the ground that these findings were plainly and manifestly against the weight of the evidence. In this con-
69 nection it is proper to bear in mind that the trial judge had all these witnesses before him, and doubtless formed his conclusions largely from their appearance on the stand, their manner of giving testimony and the apparent credibility. Under the circumstances we think the Supreme Court should have affirmed rather than reversed the action of the lower Court.

"While the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit and to other allowances claimed in the basis of our jurisdiction, the decree of the Supreme Court in dismissing plaintiff's petition renders it unnecessary to review the action of the Court of First Instance in fixing the amount that it held plaintiff was entitled to recover. We are therefore of opinion that the decree of the Supreme Court dismissing the petition must be reversed, and the cause remanded to that Court for further proceedings not inconsistent with this opinion."

The cause was then sent back to the Supreme Court of the Philippine Islands, where plaintiff presented a motion asking for the confirmation of the judgment of the trial court. A hearing was subsequently had, and on March 13, 1907, the Supreme Court rendered a decision (De la Rama vs. De la Rama, 7 Phil. Rep., 745) saying:—

"The result is that that part of the judgment of the Court of First Instance ordering the divorce, ordering the payment of
70 3,200 pesos, Mexican Currency, by the defendant to the plaintiff, and the costs of the action, is affirmed. That part of it ordering the payment by the defendant to the plaintiff of 81,042.76 pesos, Mexican currency, is set aside, and the case is remanded to the court below for the purpose of liquidating in this

action the affairs of the conjugal partnership (considering the same to have been dissolved on the 5th of July, 1902) in accordance with the rules laid down in the Civil Code, and a judgment will be entered in that court for the amount which appears from such liquidation to be due from the defendant to the plaintiff. No costs will be allowed to either party in this court."

In rendering the above decision as it does it is its opinion that in its former decision it disposed of the case only so far as relates to the divorce and not the conjugal property; and, that the Supreme Court of the United States considered only that part relating to the divorce. It says:

"The claim of the appellant now is, however, that the whole case was finally disposed of by the decision of the latter court, and that the only thing remaining for this court to do is to affirm the judgment of the Court of First Instance in its entirety.

"With this view we can not agree. The only thing considered by the Supreme Court of the United States was the part of
71 the decision of the Court of First Instance which related to the right of the plaintiff to a divorce. It did not pass upon the division of the conjugal property. Its order was that the case be remanded to this court for further proceedings not inconsistent with its opinion. If the contention of the plaintiff is true, it seems that the order of that court would have been one reversing the judgment of this court and affirming that of the Court of First Instance."

In the same decision the Supreme Court of the Philippines gives as its opinion that the method was wrong adopted by the Judge of the Court of First Instance to ascertain what constituted the conjugal property, and, as to what was its value, or, in other words that the evidence presented before him was not sufficient to warrant his judgment of P81,042.76 in favor of the plaintiff. In part it says:

"It is very evident from the provisions of the Civil Code that that inventory includes the capital of the husband, the dowry of the wife, the bienes parafernales of the wife, and all the property acquired by the partnership during its existence. After this inventory has been made it is provided by article 1421 that there shall be first paid the dowry of the wife, in the second place the bienes parafernales of the wife, in the third place the debts and obligations of the conjugal partnership, and in the fourth place the capital
72 of the husband. Articles 1424 and 1426 then provide as follows:

"Art. 1424. After the deductions from the inventoried estate specified in the three preceding articles have been made, the remainder of the same estate shall constitute the assets of the conjugal partnership.

"Art. 1426. The net remainder of the partnership property shall be divided, share and share alike, between the husband and the wife, or their respective heirs."

"It is thus seen that the conjugal property which is to be divided when the partnership is dissolved, is determined not with reference to the income or profits which may have been received during the partnership by the spouses, but rather by the amount of the actual

property possessed by them at such dissolution after making the deductions and payments aforesaid. This is positively provided by article 1424."

And again:

"The theory of the Civil Code is that the conjugal property is the actual property which is left at the dissolution of the partnership. It can, therefore, never be determined by adding up the profits, which had been made each year during its existence, and then saying that that result is the conjugal property."

73 The case was then remanded to the Court of First Instance of Iloilo for a further hearing and new decision upon the value and division of the conjugal partnership property, and the trial was had and the evidence presented in December, 1907, before the Hon. W. F. Norris, then Judge of that Court.

At this second trial, in compliance with the provisions of the Code of Civil Procedure, two assessors were appointed, Messrs. Crescenciano Lozano and Manuel Locsin. During this second trial defendant was granted permission to modify paragraph 6 of his answer so as to have it allege that during the marriage there has been no succession and that both parties to it after living separately had acquired some properties.

At this trial the plaintiff formally presented in evidence all of the testimony given in the former trial relating to the conjugal property. In addition much other testimony, oral and written, was presented by both plaintiff and defendant. Judge Norris did not render a decision in this case during the remainder of his service as judge, he subsequently resigning. On April 28, 1909 the Hon. James Ross, then Judge of the Court of First Instance of Iloilo, believing himself disqualified to decide the case, made an order in conformity with the law, designating me, Albert E. McCabe, Judge 10th Judicial District, to take charge of and dispose of said case. The last brief and written argument of the attorneys in the case was presented to me July 7, 1910. Subsequently a written agreement was submitted signed by the attorneys for the plaintiff and defendant agreeing that the case should be decided without waiting

74 for the action of the assessors.

It appears established that the plaintiff, Agueda Benedicto de la Rama and the defendant Esteban de la Rama were married in the year 1891—that she was then about 14 and he about 23 years of age—neither of them had any property at the commencement of the marriage period—the wife brought no dowry as defined in Art. 1336 Civil Code. They commenced their married life in Talisay, Occidental Negros, and lived together for thirteen months or until August, 1892, when they separated through the will of the husband and without the conformity of the wife. The plaintiff then continued to live with her mother in Valladolid, Occidental Negros, until the dissolution of the marriage July 5, 1902. During the time from the separation to the dissolution she received no aid or support from the defendant.

Through the death of her father February 1899, plaintiff received as heirship property the sum of P2,000, Mexican money.

The father of the defendant having died and left valuable properties, his four heirs, (including this defendant), did in conformity with the will of the deceased in September, 1897, organize the commercial firm of "Hijos de I. de la Rama" with headquarters in Iloilo. The capital was P1,058,192. Mexican currency, and consisted of all the moneys, effects and other properties left his heirs by their deceased father, Isidro de la Rama. Each of the four heirs held an equal or one fourth interest in his firm. The purpose of the
75 firm was to do a general commercial business. Among the provisions of the articles of organization it was required that the co-partners were bound to leave undrawn the part they had in the profits of the company, which part was to go to increase the capital thereof. It was provided that from the net profits which may be obtained, one 20 per cent shall be applied to the reserve funds, and this amount was to be deposited by the manager in any establishment of credit with the purpose of obtaining interest therefrom. It was also stipulated that the death of one of the co-partners should not cause the dissolution of the company but that his heirs would assume his rights and obligations. It made it obligatory that an inventory should be taken of the company property when one of the co-partners died. Each of the co-partners living in the Philippines was entitled to draw out for his private expenses P200. per month—those living out of the Islands, not to exceed P600. per month. Provision was made for a manager, and his salary was fixed at P450. per month and 5 per cent of the total profits. The defendant, Esteban de la Rama and co-partner in this firm of "Hijos de I. de la Rama", became its manager in February 1899, and has continued as such to the present.

On January 11, 1902, Isidro de la Rama, one of the four co-partners in this firm, died, and it is admitted that the other three co-partners (his brothers and sister), inherited his property and his one fourth share in this firm, he having died intestate and without issue.

76 It appears established that the P2,000. inherited from her father by the plaintiff; and the property inherited by the defendant from his father and brother, and all of which is included in what is his share in the firm property of "Hijos de I. de la Rama", is all of the individual capital each brought to the marriage and the conjugal partnership. It now becomes necessary to ascertain if there has been acquired any conjugal property, and if so, of what it consists, and its value at the dissolution of the conjugal partnership July 5, 1902.

It is the plaintiff's contention, in the written argument submitted, that the evidence presented demonstrates that there has been acquired during the period of this marriage conjugal property over and above debts to the value of P201,580.03, and all acquired through the salaries of defendant and percentage earned and rights and profits of his interest in the firm "Hijos de I. de la Rama" from the time of its organization to the dissolution of the marriage July 5, 1902. Plaintiff further contends that she has never received any portion of this, that the defendant has retained it all and that she is now entitled to her share of one-half or P100,791.02.

Defendant, in his written argument submitted, insists that the evidence shows that although he was manager and co-partner in the firm mentioned, yet it clearly indicates that he has only accumulated during the marriage P50,845.67 of conjugal property which he admits having in his possession.

77 He admits that the plaintiff is entitled to now receive from him P739.28 as her half of the conjugal partnership property. His reason for insisting that she is only entitled to recover from him less than one thousand pesos is that he contends that the testimony presented by him shows that his wife since her separation from him in 1892 and up to July 5, 1902 had accumulated by her own efforts, and with no other capital than the P2,000, left her in 1899, the amount of P45,567, of conjugal property.

That is, the defendant contends that while he as manager of a firm of over a million pesos capital, drawing a large salary with other perquisites, and having a one-fourth and sometime one-third interest as a co-partner has only succeeded in acquiring some P50,000, of conjugal property—while his wife a girl only 15 years old at the time of their separation, has supported herself and with only P2,000, left her in 1899, has by her sole efforts accumulated P45,000, of conjugal property in the same period of time. It might seem as if defendant would desire this court to believe that plaintiff, his former wife, would have probably made a keen and successful manager of some large business concern having a capital of a million or more pesos.

However, we are unable to wholly agree with this contention of the defendant—nor, can we fully agree with plaintiff in her claim as to what should be included in a division of the conjugal property, or the value of that ^ that was in existence in this case.

78 It is admitted that the defendant has no interest in the principal of the paraphernal P2,000, received by the plaintiff; and, that the plaintiff has no claim to any of the principal of the property inherited by defendant from his father and brother.

Art. 1392 of Civil Code says:

"By virtue of the conjugal partnership the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and the wife, share and share alike, upon the dissolution of the marriage."

According to Art. 1401, to the conjugal partnership belongs:

"1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only.

"2. That obtained by the industry, salaries, or work of the spouses or of either of them.

"3. The fruits, income, or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either one of the spouses."

Art. 1408 provides that the conjugal partnership shall be liable for:

"All the debts and obligations contracted during the marriage by the husband, and also for those contracted by the wife in the cases in which she can legally bind the partner-
79 ship.

The Civil Code provides that after the dissolution of the conjugal partnership an inventory shall be immediately made, Art. 1418;—that after the inventory has been concluded the dowry of the wife shall first be liquidated and paid, Art. 1421;—after the dowry and the parapherna of the wife have been paid, the debts, charges and obligations of the partnership shall be paid, Art. 1422;—after that the capital of the husband shall be liquidated and paid, Art. 1423:—after this the remainder of the estate shall constitute the assets of the conjugal partnership, Art. 1424;—and shall be divided, share and share alike, between the husband and wife, or their respective heirs, Art. 1426.

That we may have in a concrete form just what the plaintiff and the defendant each contend is conjugal property and its value, and that we may more clearly refer to the particular items hereafter, it is believed advisable to insert herein a copy of the summary of their claims as given by each of them in their written arguments submitted to this court. The plaintiff's is as follows:

The earnings are:

P138,480.00	One fourth part of the earnings of the firm.
22,365.61	5 per cent. the earnings due the manager in the year 1901-02.
9,763.73	5 per cent. the earnings due the manager in the year 1900-01.
6,972.69	5 per cent. the earnings due the manager in the year 1899-90.
P11,400.00	Salary of the manager as member of the firm, October 1897 to July, 1902, at P200 per month.

80

12,600.00	Salary as manager from February, 1899, to July, 1902, at P450. per month.
201,582.03	Total.

From this sum there should be deducted the debts of the wife, that is P2,000.

The remainder would be P201,580.03, a sum which should be divided between the spouses. Each one is entitled to the amount of P100,791.02."

The following is the defendant's claim and is taken from his written argument presented.

"1st. Capital of the Husband.

(*a*) A fourth part of the property of the firm H. I. de la Rama.....	P264,548.00
(*b*) A third of the fourth part of the net capital of the firm of H. de I. de la Rama, up to the 11th of January, 1902, date of the death of the member of the firm whose one-third of the fourth part pertains to E. de la Rama as the heir of the deceased.	107,069.02
Therefore the capital of the husband amounts to the sum of.....	P371,617.02

81 2nd. Dowry Property.

3d. Paraphernal Property of the Wife.

Received by the wife in inheritance from her father, property to the value of.....	P2,000.00

Profits Earned by the Capital of E. de la Rama.

"1. Result of the inventory taken at the death of I. de la Rama, one of the sons and a member of the firm, which occurred on the 11th of January, 1902, as shown in the record.....	P1,294,824.33
"2. Original capital of the Hijos de I. de la Rama Company at commencement of its operations.....	1,058,192.00
Difference	236,636.33
"(A) Therefore one fourth part of this difference (P59,159.08) is the earnings of the capital of E. de la Rama up to the 11th of January, 1902, and is property pertaining to the conjugal partnership.....	P59,159.08
"1. Capital of the firm of H. de la Rama on the 11th of January, 1902, according to the above inventory	1,294,828.33
"2. Capital of the firm of H. de I. de la Rama on the 5th of July, 1902, at the dissolution of the conjugal society, which will be set out later in	
82 detail	P1,269,888.10
Difference	24,940.23
"(B) Therefore, the third part of this difference, (P8,313.41) is the loss sustained by the capital of E. de la Rama until the dissolution of the conjugal partnership and it should be deducted from the conjugal property	8,313.41
"Therefore, the total net remainder of the profits earned by the capital of E. de la Rama is.....	50,845.67

And again:

Assets Received by the Wife Prior to the Commencement of This Action.

1. Paraphernal property	P2,000.00
2. Do. earned by the wife during the time of the marriage relations	45,567.00
Total	47,567.00

And again

"Half of the conjugal property belonging to Agueda Benedicto	P48,206.28
Received by her on account of conjugal property	47,567.00
Balance due her for her share of the conjugal property	739.28

There has been no testimony or proof presented either in
83 the first or second trial of this case that shows any profit or increase of capital or valuation in the original capital of P1,058,192, of the firm "Hijos de I. de la Rama", up to the end of the fiscal year June 30, 1900, other than that given by Fortunato Fuentes, bookkeeper for the firm. According to his statements there had been no annual closing of the books and declaration of profits prior to that year; and, that there had been heavy losses in the capital owing to the fire and bombardment of Iloilo and other causes. He testifies that the net profits of the firm's business for the year ending June 30, 1900, after paying the 20 per cent reserve and the 5 per cent to the manager was P104,590.35;—and yet, he says, the books show the appraised valuation of the firm's capital, June 30, 1901, as being P1,130,586. He further testifies that the gross profits for the fiscal year ending June 30, 1901 were P195,274.64; and, that for the year ending June 30, 1902, unless some great losses or obstacles were to happen the profits would be approximately the same as the year *proceeding*. This testimony was given by the witness Fuentes March 19-20, 1902, at the first trial.

It will be seen by the hereinbefore given summary of plaintiff's claim, that it is her contention that the conjugal property, of which she is now entitled to half, consists of defendant's share in the profits made each year by the firm "Hijos de I. de la Rama" up to July 5, 1902—also the P200. per month from October 1897 to July 1902 he was entitled to draw out as a co-partner; and all of his
84 salary and 5 per cent percentage that had been coming to him during the whole time he was manager. In other words the gross amounts of the profits, salaries, earnings and perquisites allowing nothing for loss, living or other necessary expenses, or for money spent or property disposed —.

This Court finds itself unable to agree with plaintiff in this. It is not our understanding that this is the proper method of arriving

at what is the conjugal property to be divided at the marriage dissolution. In the opinion of this Court it must be property in existence at the time of the dissolution of the marriage, and in the control or custody of one or both the conjugal partners, unless it has been disposed of in such a manner as to make one of the partners chargeable therefor in the manner provided by the provisions of the Civil Code.

This Court does not believe that the Civil Code contemplates that in the division of conjugal property, by the divorce of the husband and wife, that the gross earnings of the husband shall be computed for the whole period of the married life, and, that then the wife shall be entitled to one-half of the total as part of her conjugal property—unless she can show—or it is shown—that the gross proceeds are in existence at the marriage dissolution. In the absence of proof the Court will hardly assume that it is.

This Court is of the opinion that the proper method to arrive at the conjugal property in the possession of the defendant is to ascertain from the evidence presented the real value of the
85 moneys, credits, effects and other properties of the firm "Hijos de I. de la Rama" in existence January 11, 1902 and July 5, 1902. From this should be deducted the firm debts and the original capital of P1,050,192. The difference would be the firm's gains over its original capital. The defendant is entitled to one-fourth of those gains to January 11, 1902, and one-third from then to July 5, 1902. That would be his interest and conjugal property. To this should be added all moneys due him from the firm for unpaid salary, percentage or for any other purpose—all moneys and credits due him from other sources—all moneys, goods and effects on hand (not exempt from being included among the conjugal property by the Civil Code)—and all other interests and properties in which he held an ownership right, on July 5, 1902. All of this, having been earned and acquired during the marriage, in the manner as shown in this case, would be conjugal property, and the plaintiff is entitled to a one-half interest therein.

To ascertain this Art. 1418, Civil Code, says an inventory shall be made.

It is the opinion of this Court that it is the meaning of the Civil Code that this inventory shall be made and presented by the spouse having control and possession of the conjugal property unless some other method of making it is provided by law (as in case of the death of that party),—or by order of the Court—or by agreement between the parties.

It is not our opinion, however, that the other party, or
86 the Court, is necessarily bound to accept as correct that inventory in part or in whole if other competent proof is before the Court showing its inaccuracy. That is, that if the defendant presents the inventory the plaintiff has the right to attack its correctness, and to show by other evidence that it does not contain all or the true facts—that it does not contain all of the conjugal property—that the values given therein are not the true values, or that may in any particular change any of the material statements

of the inventory. And, the Court in deciding the amount and value of the conjugal property should do so after considering the inventory and all the other evidence presented before it, and, if there is proof before it showing the facts to be different from that given in the inventory, then it is the duty of the court to find according to that proof even though it is in direct contradiction of some of the statements in the inventory.

It is admitted that Isidro de la Rama, one of the four copartners in "Hijos de la Rama", died January 11, 1902, and that the other three partners, (the defendant being one) inherited his share and that from that time to July 5, 1902, the firm consisted of three copartners. The articles of organization of the firm provide that if one of the co-partners dies an inventory of the property of the firm shall immediately be made. It appears that this inventory was made at that time, and while it was not originally made for the purpose of this case, yet it has been presented by the defendant
87 at the second trial, as proof on his part and is marked "Defendant's Exhibit A". It purports to be an inventory of the firm property on January 11, 1902. Attached to it, and also offered by the defendant is a document marked "Document I". This purports to be an inventory of the firm's property of the date of July 5, 1902. Neither of these documents or inventories *are* under oath, nor does any witness swear to their correctness.

This "Exhibit A" gives the net capital after deducting the debts and obligations and reserve fund of the firm of January 11, 1902 as P1,294,828.33 or P236,636.33 gain over the original capital, of which one fourth or P59,159.08 was defendant's share.

The "Document I" gives the net capital of the firm July 5, 1902 as P1,269,888.10 or P24,940.23 less than that of January 11, 1902. This last shows among the debts due by the firm one of P5,609. to the defendant.

At the first trial of this case March 1902 the defendant presented no inventory of the property of the firm at that time, or of property in his possession, although this inventory of January 11, 1902 must have been in existence. The only testimony on that point at that time was that of their bookkeeper, Fortunato Fuentes, who said that according to the books the net value of the firm property June 30, 1901 was P1,130,568. Defendant must have known that this was not the true value at the time of the first trial because the inventory of January 11, 1902 then made showed a valuation in excess of that of P164,260.33.

88 This Fortunato Fuentes testifying March 19-20, 1902, says the net profits for the fiscal year ending June 30, 1900 *was* P104,590.35—for the year ending June 30, 1901 the profits without deducting the 5 per cent for the manager and the 20 per cent for reserve were P195,274.64—and that for the year ending June 30, 1902 the profits would be about the same as those before if no great losses occurred. He does not then specify any great losses occurred up to the time he testified in March.

That the profits for the two years preceeding June 30, 1901 must have been at least P320,000. would be indicated by the fact that

there appeared to be in existence January 11, 1902, P64,260.97 of the 20 per cent reserve fund.

If this Court believes that the statements as given in defendant's "Document I" *is* a true inventory and valuation of the firm property on July 5, 1902, then it is its duty to accept it and from that compute the conjugal property. And, if the Court does not believe it to be correct then it should be rejected, in so far as it is inaccurate and endeavor to ascertain the facts from the other evidence.

It is the opinion of this Court, that it cannot accept "Document I" as a true and accurate statement and inventory of the property and financial condition of the firm "Hijos de I. de la Rama" and of the defendant, on July 5, 1902. It appears to be but a partial, incomplete statement and *in* contradicted in a number of particulars by other evidence presented in this cause.

According to the testimony of the bookkeeper, Fortunato
89 Fuentes, (2nd. trial), no inventory or any liquidation, was made by the firm at the end of the fiscal year, June 30, 1902 or July 5, 1902. He says these items referred to in "Document I" was a partial liquidation ordered by Esteban de la Rama to ascertain his status. According to it the capital was P24,940.23 less on July 5, 1902 than January 11, 1902, and yet the defendant Esteban de la Rama, testifying in his own behalf at the second trial says (Record, page 114) that the books show that the firm made profit in the year 1902 up to July 5 of some P20,000. This inventory asserts there was due the defendant on July 5, 1902 from the firm a former balance of P6,690. The witness Fuentes testifying from the books says it is P6,695.77. This document shows a reserve of P64,770; Fuentes, referring to the books says it is P69,121.97, a considerable increase over January 11, 1902. This witness Fuentes is an employee of the firm and the testimony clearly shows he is friendly to the defendant. Yet from his statement it is seen that in a number of items and valuation this "Document I" does not agree with the books of the firm or with his understanding of the facts. In the first trial testifying March 19, 1902 he does not specify any losses occurring that year up to that period. However in the second trial testifying December 9, 1907, he says the firm suffered heavy losses up to July 1902 and that the principal losses were caused by the loss of work animals due to the cattle disease prevalent, and on account of which sugar cane could not be
90 planted in many portions of the haciendas. It will be noted that he says this cattle disease commenced in the last days of June 1902, which was but comparatively a few days before the dissolution of the marriage between plaintiff and defendant. He also says in his testimony in the first trial that sugar cane is planted before June of each year. This last statement is undoubtedly true as it is a matter here of common knowledge that here in the part of Negros where are the haciendas of the firm "Hijos de I. de la Rama", that the old cane has been harvested and ground and the new crop planted long before June of the year.

As we are of the opinion that "Document I" cannot be accepted

as a proper and complete inventory we are necessarily compelled to endeavor to ascertain the facts from the other evidence.

This Court feels that considerable weight should be given to the statements contained in the inventory of January 11, 1902 (and which forms a part of defendant "Exhibit A",) and that for the purposes of this case it comes as near what are probably the facts up to that time as can be arrived at from the evidence presented. This inventory was originally made because one of the partners had died and not for presentation in this cause. There was no reason why the surviving partners should not desire all of the property to be included therein and the true valuation of the capital given;—they were the beneficiaries of the deceased partner's interest.

Therefore, this Court so accepts it.

91 According to that inventory the net gains up to January 11, 1902, and which formed an addition to the capital of the firm was P236,636.33, and of which P59,159.09 or one-fourth was defendant's share, to which should be added his one-fourth of the reserve of P64,260.97 or P16,065.24. From that time to July 5, 1902 defendant had a one third interest in the firm.

We have no acceptable evidence of any great losses from January to July 1902. On the other hand there is considerable to indicate that there were profits for that six months in about the same proportion as before, and some of which went into improvements upon boats and other properties of the firm.

From the testimony of Fuentes and the amount of the reserve fund the two years prior to June 30, 1901 had produced at least P320,000 or an average of P160,000 each year. According to his testimony at the first trial the fiscal year ending June 30, 1902 would produce this same ratio or profit. He says the firm did not make a liquidation that year. However there is nothing in the testimony of the second trial to weaken his statement at the first—there is much to confirm it. It is the opinion of this Court that it should be accepted, and that the finding should be that the fiscal year ending June 30, 1902, produced a profit of equal ratio with that of the two preceding years, or P160,000. From January 11 to July 5, 1902 is app-oximately six months, and therefore P80,000 should be added to the amount given in the inventory of January

92 11, 1902 as the profits to July 5, 1902. Of this P26,666.66 or one-third would be defendant's share. To this should be added the P6,695.77 shown by the books to be due him July 5, 1902 on the former balance. Also the 5 per cent on the profits of P160,000 for the year ending June 30, 1902, and which would not be due and payable to him until that time. This would be P8,000. And, also P500. the value of the house in Molo which the defendant testified in the first trial belonged to him. Together this would be:

P59,159.08	Defendant's one-fourth share gains of firm to January 11, 1902 according inventory,
P16,065.24	One-fourth part reserve fund to January 11, 1902,
P26,666.66	One-third share profits from January 11, 1902 to July 5, 1902,
P6,695.77	Old balance due from firm July 5, 1902 according to the books,
P8,000.00	5 per cent on profits for year ending June 30, 1902,
500.00	Value of house in Molo.
P117,086.75	

This P117,086.75 would be the value of the conjugal property in possession of defendant July 5, 1902 and to which plaintiff is entitled to a one-half share, or P58,543.37.

Defendant has not claimed that he was indebted in any amounts that should be deducted from the conjugal property, so that we assume that he has no such debts.

93 Plaintiff claims that she has incurred indebtedness to the amount of P2,000, that should be chargeable to the conjugal property. However, the testimony presented by her in support of this claim does not show that it is such as comes within the provisions of Article 1408 Civil Code, and is therefore not allowed.

The testimony presented by defendant to establish his claim that plaintiff had accumulated and was in possession of P45,567 of conjugal property is very uncertain and unsatisfactory and much of it is not pertinent and cannot be considered. Much of it relates to transactions carried on by her in the purchase of nipa and palay some considerable period prior to July 5, 1902, and to personal and real property that came into her possession by gift or purchase (and partly on borrowed funds) some years after that period. The testimony presented on her behalf in the most material parts is in flat contradiction of that on behalf of the defendant, and it appears the more reasonable, and in conformity with her mode and manner of living. It is the opinion of this Court that the evidence does not show that on July 5, 1902, the plaintiff was possessed, in the concept of owner, of property in excess of value over the P2,000 inherited from her father and her individual loans and indebtedness.

Therefore, after considering the record and all of the evidence presented in this cause this Court finds that the following facts have been established.

94 1st. That the plaintiff, Agueda Benedicto de la Rama, and the defendant, Esteban de la Rama, were married in the year 1891, and lived together as husband and wife at Talisay, Occidental Negros until August 1892, when they separated and lived apart until July 5, 1902 when by decree of the Court of First Instance of Iloilo the marriage between them was dissolved in such manner as entitled the plaintiff to one-half of the conjugal property.

2nd. That at the commencement of the marriage neither the plaintiff or defendant was possessed of any property; and the plaintiff did not bring any dowry to the marriage at its commencement or any time thereafter.

3rd. That in 1899 the plaintiff inherited through the death of her father P2,000 Mexican money, and which she continued in possession of during the continuance of the marriage.

4th. That the defendant, through inheritance from his father and the subsequent organization of the firm, did in 1897 acquire a one-fourth interest in the capital of P1,058,192.00 Mexican money of the commercial firm "Hijos de I. de la Rama," with headquarters at Iloilo, Panay; and the defendant on January 11, 1902, did, by the death of his brother and co-partner, Isidro de la Rama, inherit a one-third share in the one-fourth interest held in the capital of the said firm by his late brother: thereby and from that time on to July 5, 1902 this defendant held a one-third share in the capital of the firm of "Hijos de la Rama."

5th. That as a co-partner in the firm of "Hijos de I. de la Rama" the defendant has been entitled to draw from its funds since its organization the sum of P200. per month.

95 6th. That since February 1899 to July 5, 1902 defendant was manager of the firm of "Hijos de I. de la Rama" and as such received a salary of P450. per month and 5 per cent of the profits of each year.

7th. That on July 5, 1902 defendant was possessed—over and above the capital inherited from his father and brother—of credits—interests—moneys and other property of the value of P117,086.75.

8th. That this P117,086.75 was acquired and accumulated during the period of marriage of the plaintiff and defendant and belongs to the conjugal partnership.

9th. That plaintiff on July 5, 1902 (the date of the dissolution of the marriage) was not possessed of any moneys, interests or other property belonging to the conjugal partnership.

10th. That on July 5, 1902 there were no debts in existence, incurred by either plaintiff or defendant, or by both, chargeable to the conjugal property or for which the conjugal partnership was responsible.

11th. That the value of plaintiff's share of the conjugal property in possession of defendant July 5, 1902 was P58,543.37.

12th. That the conjugal property in possession of the defendant is of such a nature that it could not be divided in kind but that the division should be made in its money equivalent.

Therefore it is ordered, adjudged and decreed by this
96 Court that the defendant, Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum of fifty pesos eight thousand, five hundred and forty three ∧ and thirty seven centavos (P58,543.37), with legal interest at the rate of 6 per cent per annum from July 5, 1902 to date of payment of this judgment.

It is further ordered and decreed by this Court that defendant pay the costs of this action.

Bacolod, Occidental Negros, December 5, 1910.

ALBERT E. McCABE,
Judge 10th Judicial District, Acting as Special Judge of Court of First Instance of Iloilo.

7—216

Heading and Title.

Judgment.

This Court having acquired proper jurisdiction to try the above-entitled case, and after due consideration thereof by the court on the record and evidence adduced, the Honorable Albert E. McCabe special judge in this case rendered a decision and order for judgment on the 5th day of December, 1910.

By virtue of the said order, it is hereby decreed that the defendant Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum of fifty-eight thousand, five hundred and
97 forty-three pesos, thirty seven centimos (P58,543.37), with legal interest at the rate of six per centum per annum from the 5th of July, 1902, until the date of the execution of this judgment, together with the costs of this instance.

Iloilo, P. I., December 7, 1910.

EDILBERTO ROLDAN,
Acting Clerk of the Court of First Instance of Iloilo.

Both parties excepted to this decision on the 10th of December 1910, and moved for a new trial. The said motion was heard on the 12th of the said month of December and was denied by the court which issued the following order:

Heading and Title.

The parties in the above-entitled case appeared before this court on the 10th of December 1910, through their respective attorneys and agreed that their motions for a new trial, both of the defendant and the plaintiff, should be presented. Both motions were decided without further notice on the said 10th day of December, 1910.

In accordance with the prayer of the parties, the court heard the motions of the plaintiff and the defendant for a new trial and after hearing the parties resolved to deny the same. Wherefore the said motions are hereby denied and both parties are allowed thirty days within which to present their respective bills of exceptions.
98 Given in Iloilo this 12th day of December, 1910.

J. S. POWELL, *Judge.*

Both parties at once excepted to this order and notified the court of their intention to file their bills of exceptions within the period fixed in the foregoing order, but by a subsequent order of the 3d of January, 1911, this period was extended until the 1st of February, 1911.

On the 1st of February, 1911, on petition of both parties, the time for the filing of their respective bills was again extended for a further period of ten days from the said date.

On the said 1st day of February, 1911, the plaintiff, through her attorneys, moved the court to order execution of the judgment unless

the defendant furnished bond to guarantee the payment of the amount thereof. To this motion the court issued the following order:

Heading and Title.

On this date the plaintiff has filed a motion asking for an execution against the properties of the defendant unless he furnish a bond to secure the compliance with the judgment. By agreement of the parties the motion was heard on the same date. Section 144
99 of the Code of Civil Procedure provides that execution can not issue until the expiration of the time allowed for the filing of the bill of exceptions, which will not be until the 11th of February, 1911. For this reason this motion can not be decided now, but it is ordered that it be set for hearing at the same time as the bill of exceptions, on Saturday, February 11, 1911.

So ordered.

Given in Iloilo this 1st day of February, 1911.

J. S. POWELL, *Judge.*

The defendant files this bill of exceptions and prays that it be certified by the court as the official bill of exceptions in this case in order to perfect his appeal.

Iloilo, February 4, 1911.

J. M. ARROYO AND
ESPIRIDION GUANKO,
Attorneys for the Defendant.

Received copy this 4th of February, 1911.

HAUSSERMANN, COHN & FISHER,
Attorneys for the Plaintiff.

After examining the foregoing bill of exceptions and agreeing thereto, I have resolved to admit it and to subscribe it as being the official bill of exceptions of the defendant in this case and to perfect the appeal asked for by the said defendant.

In witness whereof I hereunto set my hand this 18th day
100 of February, 1911.

S. J. POWELL, *Judge.*

UNITED STATES OF AMERICA:

In the Court of First Instance of the Province of Iloilo, Ninth District.

I, Juan Jamora, clerk of this court, certify that I have examined the attached document, to wit: Original of the bill of exceptions of the defendant in Civil Case No. 43, prosecuted by Agueda Benedicto vs. Esteban de la Rama, for divorce.

In witness thereof I sign the present certificate and affix the seal of this court thereto this 11th day of May, 1911.

JUAN JAMORA, *Clerk.*

Supreme Court of the Philippines, Clerk's Office—filed May 16, 1911, 11 a. m.

J. E. BLANCO, *Clerk.*

I certify that on this 5th day of January, 1912, three copies of the foregoing bill of exceptions was sent to each of the attorneys in this suit by registered mail.

J. E. BLANCO,
Clerk Supreme Court, P. I.,
By V. ALBERT, *Deputy.*

101 Thereafter, on the 5th day of November, 1912, the parties having filed their briefs, the case was duly heard and submitted to the Supreme Court for its decision.

Thereafter, on the 9th day of October, 1913, the following decision was filed:

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

R. G. No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff and Appellant,
versus
ESTEBAN DE LA RAMA, Defendant and Appellant.

Decision.

CARSON, *J.:*

The plaintiff in this action charged her husband with adultery and prayed for a divorce, the division of the conjugal property, and alimony pendente lite. Defendant in his answer denied the adultery charged against him, charged his wife with adultery, and alleged that his only income was a salary of P450 per month received as manager of the firm "Hijos de I. de la Rama." Judgment was rendered against the defendant by the trial court granting a divorce, dissolving the conjugal partnership, and allowing plaintiff the sum of P81,042.76 as her share of the conjugal property, and P3,200 as alimony.

From this judgment the defendant appealed to this Court, which reversed the judgment of the trial court, being of opinion
102 that the evidence showed that both plaintiff and defendant had committed adultery and that neither was entitled to a divorce.

Thereafter plaintiff appealed to the Supreme Court of the United States, which reversed the judgment of this Court (De la Rama vs. De la Rama, 201 U. S. 302). The opinion of that Court concluded as follows:

"We have reached the conclusion that there is no such preponderance of evidence in favor of the theory of plaintiff's guilt as au-

thorized the Supreme Court to set aside the conclusions of the court below upon the ground that these findings were plainly and manifectly against the weight of the evidence. In this connection it is proper to bear in mind that the trial judge had all these witnesses before him and doubtless formed his conclusions largely from their appearance on the stand, their manner of giving testimony, and their apparent credibility. Under the circumstances we think the Supreme Court should have affirmed rather than reversed the action of the lower court.

"While the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit, and to other allowances claimed is the basis of our jurisdiction, the decree of the Supreme Court in dismissing plaintiff's petition renders it unnecessary to review
103 the action of the Court of First Instance in fixing the amount that it held plaintiff was entitled to recover. We are, therefore, of the opinion that the decree of the Supreme Court dismissing the action must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion."

After the case had been remanded to this Court, plaintiff moved that the original judgment of the Court of First Instance be affirmed. The ruling of this Court upon that motion was in part as follows:

"Upon the defendant's appeal from the Court of First Instance to this court, eight errors were assigned by him. The first four relate to the question of adultery. This court sustained those assignment- and said:

"Our conclusion is that neither one of the parties is entitled to a divorce. The result make it unnecessary to consider that part of the judgment which relates to the settlement of the conjugal partnership."

The action of this court upon those four assignments of error relating to adultery was reversed by the Supreme Court of the United States, and by the decision of that court they were definitely disposed of. The other assignments of error relate to that part of the decision of the Court of First Instance which treats of the
104 division of the conjugal property, the allowance of alimony, and the order of the court below that the case be referred to the fiscal for criminal proceedings against the defendant. As has been said, these assignments of error were not considered by this court in view of the result which it reached upon the other assignments. Nor were they discussed by the Supreme Court of the United States.

The claim of the appellant now is, however, that the whole case was finally disposed of by the decision of the latter court, and that the only thing remaining for this court to do is to affirm the judgment of the Court of First Instance in its entirety.

With this view we can not agree. The only thing considered by the Supreme Court of the United States was that part of the decision of the Court of First Instance which related to the right of the plaintiff to a divorce. It did not pass upon the division of the conjugal property. Its order was that the case be remanded to this court for further proceedings not inconsistent with its

opinion. If the contention of the plaintiff is true, it seems that the order of that court would have been one reversing the judgment of this court and affirming that of the Court of First Instance. By remanding the case to this court for further proceedings not inconsistent with the opinion of the Supreme Court, it seems
105 to have been the intention of that court that this court should dispose of the assignments of error not already disposed of.

* * * * * * *

The sixth assignment of error was as follows:

"Error was incurred in fixing the amount of the half of said alleged conjugal property at P81,042.75, without having examined the necessary antecedents and data, and, moreover, without having taken into account the losses suffered and the debts contracted by the firm "Hijos de I. de la Rama."

This assignment of error, not having been considered either by the Supreme Court of the United States or by this court, is now open to consideration by us, and must, we think, be sustained. The Civil Code states in detail the manner in which the affairs of a conjugal partnership shall be settled after the same has been dissolved. Article 1418 provides, except in certain cases not here important, that an inventory shall at once be made. We have held in the case of Alfonso vs. Natividad (6 Phil. Rep. 240), that when the partnership is dissolved by the death of the husband this inventory must be made in the proceedings for the settlement of his estate. And in the case of Prado vs. Lagera (7 Phil. Rep. 395), that the inventory thus formed must include the bienes para-
106 fernales of the wife. It is very evident from the provisions of the Civil Code that that inventory includes the capital of the husband, the dowry of the wife, the bienes parafernales of the wife, and all the property acquired by the partnership during its existence. After this inventory has been made it is provided by article 1421 that there shall be first paid the dowry of the wife, in the second place the bienes parafernales of the wife, in the third place the debts and obligations of the conjugal partnership, and in the fourth place the capital of the husband. Articles 1424 and 1426 then provide as follows:

'Art. 1424. After the deductions from the inventoried estate specified in the three preceding articles have been made, the remainder of the same estate shall constitute the assets of the conjugal partnership.

'Art. 1426. The net remainder of the partnership property shall be divided, share and share alike, between the husband and the wife, or their respective heirs.'

It is thus seen that the conjugal property which is to be divided when the partnership is dissolved, is determined not with reference to the income or profits, which may have been received during the partnership by the spouses but rather by the amount of the actual property possessed by them at such dissolution after mak-
107 ing the deduction and payments aforesaid. This is positively provided by article 1424.

An examination of the decision of the Court of First Instance shows that no attempt was made to comply with any one of these statutory provisions. No inventory of the partnership property existing at the time of the trial, at which the liquidation was made, was ever formed. No provision was made for paying to the wife the sum of 2,000 pesos, which was either the dowry or bienes parafernales of the wife. No provision was made for returning to the husband his capital in the partnership, which amounted to at least one-third of the assets of the firm of Hijos de I. de la Rama, which assets, according to the inventory made January 30, 1901, amounted to 1,130,568 pesos. The court below rejected entirely the method prescribed by the Civil Code for the liquidation of this partnership and in fact liquidated it, as appears from the decision, upon an entirely different basis. He determined in the first place the income which each person had received from his or her property during the partnership, finding that the wife during that time had received from her property 345 pesos as income and that the husband had received 162,430.53 pesos. He then says:

'The total value therefore of the conjugal partnership
108 existing between the plaintiff and the defendant in the present case amounts to 162,775.53 pesos. The words of the statute say that the same must be divided share and share alike. This means that each should have 81,387.76 pesos. The wife already having in her possession 345 pesos of this sum, she is entitled to receive from the husband 81,042.76 pesos as being the sum necessary to equalize the holdings of the property which, according to the statute, must be regarded as belonging to the conjugal partnership.'

It needs no argument to show that this manner of liquidating the affairs of the conjugal partnership is entirely unwarranted by the law. The theory of the Civil Code is that the conjugal property is the actual property which is left at the dissolution of the partnership. It can, therefore, never be determined by adding up the profits, which had been made each year during its existence, and then saying that that result is the conjugal property. The difference between the two systems of liquidation is well illustrated in this case. The court below found that the profits of the partnership of Hijos de I. de la Rama from the time of its organization up to June 30, 1901, amounted to 290,101.31 pesos. The evidence in the case shows, however, that the capital with which the firm started
was 1,058,192 pesos, and that on June 30, 1901, the value
109 of its entire property was 1,130,568 pesos, an increase of only 72,376 pesos. Taking the method adopted by the court below, if the conjugal partnership had been dissolved on June 30, 1901, it would have had as an asset one-fourth of this sum of 290,101.31 pesos, but following the rule laid down by the Civil Code it would have only had one-fourth of 72,376 pesos, the difference between the value of the property of said firm when it was organized and its value on the 30th of June, 1901.

The other assignments of error were not argued in the last brief

presented by the appellant and in any event we do not think they can be sustained.

The result is that that part of the judgment of the Court of First Instance ordering the divorce, ordering the payment of 3,200 pesos, Mexican currency, by the defendant to the plaintiff, and the costs of the action, is affirmed. That part of it ordering the payment by the defendant to the plaintiff of 81,042.76 pesos, Mexican currency, is set aside, and the case is remanded to the court below for the purpose of liquidating in this action the affairs of the conjugal partnership (considering the same to have been dissolved on the 5th of July, 1902) in accordance with the
110 rules laid down in the Civil Code, and a judgment will be entered in that court for the amount which appears from such liquidation to be due from the defendant to the plaintiff.

To the judgment of this Court overruling the motion and sending the case back to the Court of First Instance for a new trial, plaintiff duly saved her exception.

Upon the new trial in the court below, judgment was rendered in favor of the plaintiff for the sum of P58,543.37, with interest at the rate of six per cent, per annum from July 5, 1902, the date of the original judgment decreeing the divorce.

From this judgment both plaintiff and defendant appealed, and the case is once again before us upon their bills of exceptions.

Plaintiff on this appeal adheres to her contention set up in the motion to affirm the original judgment of the Court of First Instance submitted after the case had been remanded to this Court from the Supreme Court of the United States and insists that:

"This court was without jurisdiction to review the evidence taken in the court below at the first trail, or re-try the questions of fact, because the defendant failed to file in the Court of First Instance a motion for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence.

The action of this Court of January 23, 1907, in holding
111 that the motion for a new trial in the Court of First Instance on the ground that the 'conclusions which in said decision had been deducted from the facts are contradictory to what the evidence filed in the case has shown', is a compliance with Section 497, paragraph 3 of the Code of Civil Procedure, is inconsistent with and contrary to the unanimous opinion of the Supreme Court of the United States expressed in the decision of that court on said identical motion then under consideration by said court in this cause on appeal, and such ruling, therefore, is a failure to comply with the mandate of the said United States Supreme Court.

In any event, the findings of the Court of First Instance were not so 'plainly and manifestly against the weight of evidence' as to authorize this Court to set aside said findings of fact and set aside and annul the judgment rendered by the trial court based on said findings of fact."

All of the contentions of plaintiff-appellant in support of these assignments of error were disposed of in the opinion filed upon her motion in 1906 in De la Rama vs. De la Rama, 7 Phil. Rep. 745,

as appears from the extracts therefrom hereinbefore set forth; and the Court is of opinion that it should adhere to the position taken at that time.

112 The contentions of the defendant-appellant on this appeal are, substantially, that the trial court erred in its findings of fact as to the value of the conjugal property, and in the mode of procedure adopted in liquidating the partnership assets.

After a careful review of the entire record, we think that the findings of fact by the trial judge are fully sustained by the evidence, and that the method adopted by him in liquidating the assets of the conjugal partnership was substantially in accord with the method prescribed in the code and indicated in our opinion filed with our judgment remanding the case for a new trial (De la Rama vs. De la Rama, 7 Phil. Rep. 745).

The principal contention of defendant-appellant on this appeal is that the trial court erred in failing to deduct from the amount allowed to the plaintiff-appellant the sum of P45,567., that being the amount of conjugal property which defendant claims "had accumulated and come into plaintiff's possession", at the time when the divorce was granted.

We agree with the trial judge that the evidence of record fails utterly to sustain this extraordinary contention. Discussing the defendant's claim in this regard the trial court said:

"The testimony presented by defendant to establish his claim that plaintiff had accumulated and was in possession of P45,567

113 of conjugal property is very uncertain and unsatisfactory, and much of it is not pertinent and cannot be considered. Much of it relates to transactions carried on by her in the purchase of nipa and palay some considerable period prior to July 5, 1902, and to personal and real property that came into her possession by gift or purchase (and partly on borrowed funds), some years after that period. The testimony presented on her behalf in the most material parts is in flat contradiction of that on behalf of the defendant, and it appears the more reasonable and in conformity with her mode and manner of living. It is the opinion of this court that the evidence does not show that on July 5, 1902 the plaintiff was possessed, in the concept of owner, of property in excess of value over the P2,000 inherited from her father and her individual loans and indebtedness."

And elsewhere in his opinion the trial judge, commenting upon defendant's claim, made use of the following language:

"His reason for insisting that she is only entitled to recover from him less than P1,000 is that he contends that the testimony presented by him shows that his wife, since her separation from him in 1892 and up to July 5, 1902, had accumulated by her own

114 efforts and with no other capital than the P2,000, left her in 1899, the amount of P45,567, of conjugal property.

That is, the defendant contends that while he as manager of a firm of over a million pesos capital, drawing a large salary with other perquisites, and having a one-fourth and sometime one-third interest as a co-partner, has only succeeded in acquiring some P50,000.

of conjugal property—while his wife a girl only fifteen years old at the time of their separation, has supported herself and with only P2,000., left her in 1899, has by her sole efforts accumulated P45,000. of conjugal property in the same period of time."

In so far as defendant-appellant's assignments of error are based on the action of the trial court in refusing to accept as true the contents of the document described as Exhibit 1, it might be sufficient to say that we are of opinion that the reasons for doing so set forth by the trial judge himself in his opinion are a sufficient refutation of defendant-appellant's contention in this regard. Exhibit 1 purports to be an inventory of the property of the firm of "Hijos de I. de la Rama" as of July 5, 1902. The bulk of the conjugal property consisted of an undivided share of this property. As pointed out by the trial judge, this inventory appears to have been prepared by or for the defendant for the purposes of this action; and in any
115 event it was prepared after this action was originally instituted, and under conditions which justified the trial judge in believing that the defendant had every opportunity to intervene in its preparation and to use his personal influence to have the document speak favorably to his contentions. Granting that it is true, as contended by defendant, that this document was admitted in evidence without objection, it by no means follows that the trial judge was bound to accept its contents as true where other evidence of record disclosed its inaccuracies and its failure correctly to list the properties in question. It was admitted for what it was worth as evidence, but in the very nature of things, it should not be held as conclusive of the truth of its contents. We think that the trial judge is fully sustained by the evidence of record in his findings that this inventory failed to set forth the true status of the affairs of the company, and we are of opinion, and so hold, that there was no error in his findings as to the true value of the property in question.

What has been said sufficiently disposes of all the errors assigned. We are of opinion, therefore, that there is nothing in the record which would justify us in sustaining the contentions of the defendant-appellant as to error in the findings of fact or in the conclusions drawn therefrom in the opinion filed by the trial judge.

The judgment entered in the court below should be and is hereby affirmed, without costs to either party.

It is so ordered.

116 Heading and Title.

October 9, 1913.

Messrs. Haussermann, Cohn & Fisher, Lionel D. Gargis, Arroyo & Guanko.

GENTLEMEN: You are hereby notified that on the 9th day of October, 1913, a decision rendered by this Court in the above entitled cause was filed in this office, whereby the judgment appealed from is affirmed without special finding as to costs. Twenty days from the notification of the decision let judgment be rendered in accord-

ance therewith and ten days thereafter the record will be returned to the lower court for proper action.

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands,
By P. R. ANGELL, *Deputy.*

Heading and Title.

Comes now the defendant-appellant and respectfully petitions the Supreme Court for a rehearing of the above entitled cause upon the following grounds :

I. The judgment of the Court of First Instance, affirmed
117 by the Supreme Court is not a judgment of division of conjugal property between the plaintiff and defendant but rather a judgment against defendant for moneys held to belong to the plaintiff and in the possession of Hijos de I. de la Rama.

II. The Supreme Court in affirming the decision of the lower Court, in effect, overrules its prior decision in this case in not requiring an inventory to be made as provided in the Civil Code and in the prior decision in this case. If the inventory presented by the defendant was not satisfactory to the Court below, then the Court should have caused one to be made that was satisfactory.

III. The item of P26,666.66, being one-third of the profits from January 11th to July 5th, 1902, as well as the item of P8,000, being 5 per centum on the profits for the year ending June 30th, 1902, are entirely speculative and not based on any legal testimony whatsoever. A bookkeeper's opinion of probable profits, it is respectfully contended is not evidence.

IV. Lastly we request the Court's consideration and decision on the question of interest. The lower Court rendered judgment for P85,543.37, together with interest thereon at 6 per centum from July 5th, 1902.

In the judgment of Judge Odlin of July 5th, 1902, there is noth-
ing said concerning interest. That judgment was reversed
118 by this Court on the 8th day of December, 1903, and the case was ordered dismissed. The Supreme Court of the United States did not re-establish the judgment of Judge Odlin in any part, but only held that the plaintiff was entitled to a decree of divorce and directed proceedings to be had accordingly. Even if the judgment of July 5th, 1902, had been re-established in all its parts by the Supreme Court of the U. S., it is difficult to see upon what principal the plaintiff would have been entitled to interest thereon from the rendition of the judgment in the Court of First Instance on July 5th, 1902.

It is certain that there was no judgment bearing interest in this case after the dismissal thereof by this Court on the 8th day of December, 1903. After the rendition of the judgment of the Supreme Court of the United States and before the rendition of the judgment by Judge McCabe on the 5th day of December, 1910, there was no judgment or liquidated sum that the defendant could pay or satisfy. Why should he then pay interest?

The judgment now under consideration does not bear interes
under the provisions of Art. 1108 of the Civil Code or any decision
of this Court.

The amount allowed plaintiff by the judgment of July 5th, 190
in the division of the conjugal property was reversed by this Cou
by its judgment of March 13, 1907. Why then should the defen
ant pay interest from the date of a reversed judgment? We b
lieve that this question has not received the consideration
119 the Court and since it involves an important amount w
ask that it be considered.

In an unliquidated demand which either party has the right
have liquidated, we believe it to be the universal rule not to allo
interest except from date of final judgment.

It may be that the plaintiff would be entitled to a liquidation
the conjugal property as of December 5th, 1910, but it seems th
she does not ask it. We believe that in equity the defendant is sti
entitled to a consideration of the question of interest. The yea
since 1902, the beginning of the epizootia, have been mostly di
astrous to the agriculturist.

Respectfully submitted,

ARROYO & GUANKO.
ROHDE & WRIGHT.

Office of the Clerk, Supreme Court of the Philippine Islands, Manil

October 23, 1913.

Messrs. Haussermann, Cohn & Fisher, Lionel D. Hargis, Arroyo
Guanko.

GENTLEMEN: The Supreme Court, in yesterday's session, resolv
as follows:

120 "After being informed of the petition filed by attorne
Arroyo & Guanko and Rohde & Wright, praying for a
hearing in case No. 7476, Agueda Benedicto de la Rama vs. Esteb
de la Rama, the Court, after due consideration thereof, resolved th
the motion be denied and that the parties abide by the decision."

This for your information.

For the Clerk,

P. R. ANGELL, *Deputy.*

Heading and Title.

Judgment.

October 30, 1913.

The Court having regularly acquired jurisdiction for the trial
the above-entitled cause submitted by both parties for decision, af
consideration thereof by the Court upon the record, its decision a
order for judgment having been filed on the 9th day of Octob
1913.

By virtue thereof it is hereby adjudged and decreed that the ju

ment of the Court of First Instance of Iloilo, dated the 5th
121 day of December, 1910, and from which the above-entitled appeal was taken, be, and the same is hereby confirmed, without any pronouncement as to costs.

* * * * * * *

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

Heading and Title.

And now comes Esteban de la Rama, defendant herein, and says: That on or about the 30th day of October, 1913, the Supreme Court of the Philippine Islands entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and proceedings had prior hereto in this cause certain errors were committed to the prejudice of this plaintiff all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may be issued in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenti-
122 cated, may be sent to the Supreme Court of the United States.

ROHDE & WRIGHT,
Attorneys for Defendant and Plaintiff in Error.

Heading and Title.

The defendant in this case, in connection with his petition for a writ of error, makes the following assignment of errors which he avers exist:

1. The Court erred in holding that the marriage between the plaintiff and defendant was dissolved July 5th, 1902.

2. The Court erred in liquidating the conjugal property as of July 5th, 1902.

3. The Court erred in not requiring an inventory to be made of the conjugal property as provided in book 4, Chapter 5, section 7, of the Civil Code. (Articles 1418 et seq.)

4. The Court erred in liquidating the conjugal property without an inventory as provided in book 4, chapter 5, section 7, of the Civil Code. (Articles 1418, et seq.)

5. The Court erred in finding that the conjugal property
123 could not be divided in kind.

6. The Court erred in not dividing the conjugal property in kind as provided in article 1426 of the Civil Code.

7. The Court erred in making findings respecting the profits made by the partnership "Hijos de I. de la Rama," whereon to base a judgment against the defendant, without requiring said partnership to be made a party.

8. The Court erred in holding that there is evidence to support

the finding that the conjugal property in the possession of defendant on the 5th day of July, 1902, was of the value of P117,086.75.

9. The Court erred in holding that the entire share of the defendant in the profits of the partnership "Hijos de I. de la Rama" from June 30, 1900 to June 30th, 1902, constituted conjugal property in the possession of defendant without proof of their actual existence on the day of trial of the cause or the day of the rendition of judgment.

10. The Court erred in finding that the firm of "Hijos de I. de la Rama" made profits during the year ending June 30th, 1902.

11. The Court erred in basing its judgment against the defendant in part on conjectural profits of the firm of "Hijos de I. de la Rama" for the year ending June 30th, 1902.

12. The Court erred in allowing interest on its judgment
124 from July 5th, 1902.

Manila, P. I., November 6th, 1913.

ROHDE & WRIGHT,
Attorneys for Defendant.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff,
vs.
ESTEBAN DE LA RAMA, Defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Court before you between Agueda Benedicto de la Rama, plaintiff and Esteban
125 de la Rama, defendant, wherein it appears a manifest error has happened, to the great damage of the said defendant, as by his complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 7 day of March next in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice

of the United States, this 7th day of November in the year of Our Lord One Thousand Nine Hundred and Thirteen and of the Independence of the United States of America the One Hundred and Thirty-seventh.

V. ALBERT,
Clerk Supreme Court P. I.

The foregoing writ of error is allowed this 7th day of November, 1913, upon the filing by defendant of a bond with good and
126 sufficient surety, in the sum of 55,000 Dollars, United States Currency, to prosecute the said writ of error to effect and answer all damages and costs if he fails to make good his plea.

Let a certified copy of the record testimony, stipulation, and all proceedings herein, be transcripted forthwith to said Supreme Court of the United States.

A. C. CARSON,
Associate Justice of the Supreme Court of the Philippine Islands.

Heading and Title.

To Agueda Benedicto:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington on the 7th day of March next, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the Philippine Islands wherein Esteban de la Rama is defendant and you are plaintiff, to show cause, if any there be, why the judgment rendered against the said defendant as in said writ of error mentioned should not be corrected and speedy justice be done to the parties in this behalf.

Given under my hand at the City of Manila in the Philip-
127 pine Islands, this 7th day of November in the year of Our Lord One thousand nine hundred and thirteen.

A. C. CARSON,
Associate Justice of the Supreme Court of the Philippine Islands.

Service by copy is admitted this 7th day of November, 1913.

HAUSSERMANN, COHN & FISHER,
Attorneys for Plaintiff.

Heading and Title.

The above named defendant, conceiving himself aggrieved by the judgment made and entered on the 30th day of October, nineteen hundred and thirteen, in the above entitled cause, does hereby appeal from the said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon

which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROHDE & WRIGHT,
Attorneys for Defendant and Appellant.

November 7, 1913.

The foregoing appeal is allowed.

(Sgd.) A. C. CARSON,
Associate Justice.

Aug.

128 Heading and Title.

The defendant prays an appeal from the final decree of this Court to the Supreme Court of the United States, and assigns for error:

1. The Court erred in holding that the marriage between the plaintiff and defendant was dissolved July 5th, 1902.

2. The Court erred in liquidating the conjugal property as of July 5th, 1902.

3. The Court erred in not requiring an inventory to be made of the conjugal property as provided in book 4, Chapter 5, section 7, of the Civil Code. (Articles 1418 et seq.)

4. The Court erred in liquidating the conjugal property without an inventory as provided in book 4, chapter 5, section 7, of the Civil Code. (Articles 1418, et seq.)

5. The Court erred in finding that the conjugal property could not be divided in kind.

6. The Court erred in not dividing the conjugal property in kind as provided in article 1426 of the Civil Code.

7. The Court erred in making findings respecting the profits made by the partnership "Hijos de I. de la Rama," whereon to base a judgment against the defendant, without requiring said partnership to be made a party.

8. The Court erred in holding that there is evidence to
129 support the finding that the conjugal property in the possession of defendant on the 5th day of July, 1902, was of the value of P117,086.75.

9. The Court erred in holding that the entire share of the defendant in the profits of the partnership "Hijos de I. de la Rama" from June 30th, 1900, to June 30th, 1902, constituted conjugal property in the possession of defendant without proof of their actual existence on the day of trial of the cause or the day of the rendition of judgment.

10. The Court erred in finding that the firm of "Hijos de I. de la Rama" made profits during the year ending June 30, 1902.

11. The Court erred in basing its judgment against the defendant in part on conjectural profits of the firm of "Hijos de I. de la Rama" for the year ending June 30th, 1902.

12. The Court erred in allowing interest on its judgment from July 5th, 1902.

Manila, P. I., November 6th, 1913.

ROHDE & WRIGHT,
Attorneys for Defendant.

130 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff,
vs.
ESTEBAN DE LA RAMA, Defendant.

The President of the United States to Agueda Benedicto, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within one hundred and twenty days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the Philippine Islands and filed in the Clerk's Office of the said Court on the 7th day of November, 1913, in a cause wherein Esteban de la Rama is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 7th day of November, 1913.

A. C. CARSON,
Associate Justice of the Supreme Court
of the Philippine Islands.

Service by copy is admitted this 7th day of November,
131 1913.

HAUSSERMANN, COHN & FISHER,
Attorneys for Plaintiff.

Heading and Title.

Comes now the defendant in the above entitled cause and petitions the Court that he be granted time until the 24 of the present month for the giving of the necessary bond on the appeal of this case to the Supreme Court of the United States.

ROHDE & WRIGHT,
Attorneys for Defendant,
103 *Juan Luna, Manila.*

Conforme.
HAUSSERMANN, COHN & FISHER,
p. p. CHARLES C. COHN,
Attorneys for Plaintiff.

Office of the Clerk, Supreme Court of the Philippine Islands, Manila.

November 11, 1913.

Messrs. Haussermann, Cohn & Fisher, Rohde & Wright, Southworth & Hargis, Arroyo & Guanko.

132 GENTLEMEN: The Supreme Court, in yesterday's session, resolved as follows:

"After being informed of the petition of counsel for the defendant in case No. 7476, Agueda Benedicto de la Rama vs. Esteban de la Rama, praying that they be allowed until the 24th instant to present the bond in the said case for the purposes of the appeal to the Supreme Court of the United States, the Court, after due consideration thereof, resolved that the motion be granted."

This for your information.

For the Clerk.

P. R. ANGELL, *Deputy.*

Heading and Title.

Comes now the defendant in the above entitled cause and petitions the Court that he be granted time until the 7th day of December next for the giving of the necessary bond on the appeal of this case to the Supreme Court of the United States.

Manila, P. I., November 24th, 1913.

ROHDE & WRIGHT,
Attorneys for Defendant,
103 *Juan Luna, Manila.*

Conformes.

HAUSSERMANN, COHN & FISHER,
Attorneys for Plaintiff.

133 Office of the Clerk, Supreme Court of the Philippine Islands, Manila.

November 26, 1913.

Messrs. Haussermann, Cohn & Fisher, Rohde & Wright, Southworth & Hargis, Arroyo & Guanko.

GENTLEMEN: The Supreme Court, in yesterday's session, resolved as follows:

"After being informed of the petition of counsel for the defendant in case No. 7476, Agueda Benedicto de la Rama vs. Esteban de la Rama, praying that they be allowed until the 7th day of December to present the bond in the said case for the purposes of the appeal to the Supreme Court of the United States, the Court, after due consideration thereof, resolved that, ∧ the motion be granted." V. A.

as the other party agrees,

This for your information.

For the Clerk.

P. R. ANGELL, *Deputy.*

Heading and Title.

Comes now Esteban de la Rama, the appellant in the
134 above entitled cause, and submits herewith a bond to serve as supersedeas on the writ of error and appeal herein to the Supreme Court of the United States, and respectfully asks that 9 o'clock a. m. of Thursday, December 11th, 1913, be fixed as the time for the justification of the sureties.

Manila, P. I., December 6th, 1913.

ROHDE & WRIGHT,
Attorneys for Defendant,
103 *Juan Luna, Manila.*

Conform for the time above mentioned.

HAUSSERMANN, COHN & FISHER,
For Plaintiff.

Office of the Clerk, Supreme Court of the Philippine Islands, Manila.

December 9, 1913.

Messrs. Southworth & Hargis, Haussermann, Cohn & Fisher, Rohde & Wright, Arroyo & Guanko.

GENTLEMEN: The Supreme Court, in yesterday's session, resolved as follows:

"After being informed of the petition filed by attorneys
135 Rohde & Wright praying that the Court set the 11th instant at 9 o'clock of the morning, for the examination and qualification of the sureties of the bond furnished for the purposes of the appeal to the Supreme Court of the United States in case No. 7476, Agueda Benedicto de la Rama vs. Esteban de la Rama, the Court resolved that the sureties should appear before Justice A. C. Carson at 9 o'clock of the morning of the 11th instant to qualify for the bond.

This for your information.

For the Clerk.

P. R. ANGELL, *Deputy.*

Heading and Title.

Clerk of the Supreme Court of the Philippine Islands.

SIR: For the purpose of the appeal and writ of error in the above entitled cause you will please remit a certified copy of the entire record to the Supreme Court of the United States.

ROHDE & WRIGHT,
Attorneys for Appellant and Plaintiff in Error.

136 UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

R. G. No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff,
versus
ESTEBAN DE LA RAMA, Defendant.

Know all men by these presents:

That we, Esteban de la Rama, as principal, and Dolores de la Rama, Eulalia Buenaflor, Celedonio Bailon, Aniceto Lacson, Rafael Campos, and Ruperto Montinola and Anastasia de la Rama as sureties, are held and firmly bound unto the above named Agueda Benedicto de la Rama in the sums following; the said Esteban de la Rama in the sum of (P110,000) one hundred ten thousand pesos; the said Dolores de la Rama likewise in the full sum of (P110,000) one hundred ten thousand pesos; the said Eulalia Buenaflor in the sum of (P60,000) sixty thousand pesos; the said Celedonio Bailon in the sum of (P50,000) fifty thousand pesos; the said Aniceto Lacson in the sum of (P50,000) fifty thousand pesos; the said Rafael Campos in the sum of (P30,000) thirty thousand pesos; the said Ruperto Montinola and Anastasia de la Rama in the sum of (P30,000) thirty thousand pesos, to be paid to the said

137 Agueda Benedicto de la Rama for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents. Sealed with our seals, and dated the 15th day of November, in the year of Our Lord One Thousaid Nine Hundred and Thirteen. Whereas the above named Esteban de la Rama has prosecuted an appeal and writ of error to the Supreme Court of the United States, to reverse the decree and judgment rendered in the above entitled suit, by the Supreme Court of the Philippine Islands.

Now therefore, the condition of this obligation is such, that if the above named Esteban de la Rama shall prosecute said appeal and writ of error to effect and answer all damages and costs, if he fail to make said appeal or writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ESTEBAN DE LA RAMA.
DOLORES DE LA RAMA DE BAILON.
EULALIA BUENAFLOR VDA. DE LA RAMA.
CELEDONIO BAILON.
ANICETO LACSON.
RUPERTO MONTINOLA.
R. CAMPOS.
ANASTASIA DE LA RAMA.

Approved.

A. C. CARSON,
Associate Justice Supreme Court P. I.

Manila, P. I., December 26, 1913.

138 In the Supreme Court of the Philippine Islands.

I, Vicente Albert, Clerk of the Supreme Court of the Philippine Islands, do hereby certify that in a case pending in said Supreme Court, wherein Agueda Benedicto de la Rama was plaintiff and appellant and Esteban de la Rama was defendant and appellant, a final decree was rendered by said Supreme Court of the ninth day of October, 1913, and that on the 7th day of November, 1913, the defendant sued out a writ of error and prayed an appeal to the Supreme Court of the United States which was allowed.

In testimony whereof I hereunto set my hand and affix the seal of said Supreme Court at Manila, Philippine Islands, this 21st day of January, 1914.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

139 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

I, Vicente Albert, do hereby certify that the foregoing one hundred thirty-eight (138) pages of typewritten matter *is* a true and correct translation and transcript of the record and proceedings had in the Court of First Instance of Iloilo and the Supreme Court of the Philippine Islands in the case of Agueda Benedicto de la Rama, plaintiff and appellant, vs. Esteban de la Rama, defendant and appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court this 21st day of January, A. D. 1914.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT,
Clerk of the Supreme Court of the Philippine Islands.

140 THE UNITED STATES OF AMERICA:
ESTADOS UNIDOS DE AMÉRICA:

Supreme Court of the Philippine Islands.
Corte Suprema de las Islas Filipinas.

October 30, 1913.

File No. 7476.
Registro No.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff and Appellant,
Demandante y apela,

versus
contra

ESTEBAN DE LA RAMA, Defendant and Appellant.
Demandad y apela.

Judgment.
Sentencia.

The Court having regularly acquired jurisdiction for the trial of the above-entitled
Adquirida por este Tribunal la debida competencia para el conocimiento del asunto arriba
cause submitted by both parties for decision, after consideration thereof by the Court
titulado, el cual ha sido sometido por ambas partes para su resolución, y después de considerado por el Tribunal
upon the record, its decision and order for judgment having been filed on the 9th
con vista de los autos, su decisión y orden para la sentencia, habiendo sido registradas el día
day of October, A. D. nineteen hundred and thirteen.
de mil novecientos

By virtue thereof it is hereby adjudged and decreed that the judgment of the
En virtud de dicha orden se decreta por la presente que la sentencia del
Court of First Instance of Iloilo, dated the 5th day of December
Juzgado de Primera Instancia de fecha de
nineteen hundred and ten, and from which the above-entitled appeal was taken,
de mil novecientos y contra la cual se interpuso dicha apelación
be, and the same is hereby affirmed, without costs to either party.
sea

It is further ordered that * * * recover from * * *
Se ordena, además, que recobre de
the sum of P—, as costs.
la cantidad de en concepto de costas.

[Seal Corte Suprema, Islas Filipinas.]

V. ALBERT.
Clerk of the Supreme Court of the Philippine Islands.
Escribano de la Corte Suprema de las Islas Filipinas.

I certify that the foregoing is a true copy.

P. R. ANGELL,
Deputy Clerk Supreme Court of the P. I.

141 Supreme Court, Philippine Islands, Clerk's Office. Filed Nov. 7, 1913, 11 A. M.

UNITED STATES OF AMERICA:

No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff,
vs.
ESTEBAN DE LA RAMA, Defendant.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Supreme Court of the Philippine Islands, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Court before you between Agueda Benedicto de la Rama, plaintiff and Esteban de la Rama, defendant, wherein it appears a manifest error has happened, to the great damage of the said defendant, as by his complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the 7 day of March next in the said Supreme Court, to be then and there held, that the records and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 7 day of November in the year of Our Lord One Thousand Nine Hundred and Thirteen and of
142 the independence of the United States of America the One Hundred and Thirty-seventh.

V. ALBERT,
Clerk Supreme Court, P. I.

Supreme Court, Philippine Islands, Clerk's Office. Filed Nov. 7, 1913, 11 a. m.

The foregoing writ of error is allowed this 7th day of November, 1913, upon the filing by defendant of a bond with good and sufficient surety, in the sum of 55,000 dollars, United States Currency, to prosecute the said writ of error to effect and answer all damages and costs if he fails to make good his plea.

Let a certified copy of the record, testimony, stipulation, and

all proceedings herein, be tra-scripted forthwith to said Supreme Court of the United States.

A. C. CARSON,
Associate Justice of the Supreme Court of the Philippine Islands.

fa/.

143 Supreme Court, Philippine Islands, Clerk's Office. Filed Nov. 7, 1913, 11 A. M.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff,
vs.
ESTEBAN DE LA RAMA, Defendant.

To Agueda Benedicto:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington on the 7 day of March next, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the Philippine Islands wherein Esteban de la Rama is defendant and you are plaintiff, to show cause, if any there be, why the judgment rendered against the said defendant as in said writ of error mentioned should not be corrected and speedy justice be done to the parties in this behalf.

Given under my hand at the City of Manila in the Philippine Islands, this 7 day of November in the year of Our Lord One Thousand nine hundred and thirteen.

A. C. CARSON,
Associate Justice of the Supreme Court of the Philippine Islands.

Service by copy is admitted this 7th day of November, 1913.

HAUSSERMANN, COHN & FISHER,
Attorneys for Plaintiff.

fa/.

144 Supreme Court, Philippine Islands, Clerk's Office. Filed Nov. 7, 1913, 11 A. M.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 7476.

AGUEDA BENEDICTO DE LA RAMA, Plaintiff,
vs.
ESTEBAN DE LA RAMA, Defendant.

The above named defendant, conceiving himself aggrieved by the judgment made and entered on the 30th day of October, nineteen hundred and thirteen, in the above entitled cause, does hereby appeal from the said judgment and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said judgment and decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

ROHDE & WRIGHT,
Attorneys for Defendant and Appellant.

November 7, 1913.

The foregoing appeal is allowed.

A. C. CARSON,
Associate Justice.

fa/.

145 Supreme Court, Philippine Islands, Clerk's Office. Filed Nov. 7, 1913, 11 A. M.

UNITED STATES OF AMERICA:

In the Supreme Court of the Philippine Islands.

No. 7476.

AGUEDA BENEDICTA DE LA RAMA, Plaintiff,
vs.
ESTEBAN DE LA RAMA, Defendant.

The President of the United States to Agueda Benedicto, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington, within one hundred and twenty days from the date of this writ, pursuant to an appeal duly allowed by the Supreme Court of the

Philippine Islands and filed in the Clerk's Office of the said Court on the 7 day of November, 1913, in a cause wherein Esteban de la Rama is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this 7 day of November, 1913.

A. C. CARSON,
Associate Justice of the Supreme Court
of the Philippine Islands.

Service by copy is admitted this 7th day of November, 1913.

HAUSSERMANN, COHN & FISHER,
Attorneys for Plaintiff.

fa/.

Endorsed on cover: File No. 24,328. Philippine Islands Supreme Court. Term No. 216. Esteban de la Rama, plaintiff in error and appellant, vs. Agueda Benedicto de la Rama. Filed August 5, 1914. File No. 24,328.

Office Supreme Court, U. S.
FILED
APR 17 1916
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 216.

ESTEBAN DE LA RAMA, *Plaintiff in Error and Appellant,*

vs.

AGUEDA BENEDICTO DE LA RAMA, *Defendant in Error and Appellee.*

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

RUFUS S. DAY,
CHARLES EDMOND COTTERILL,
Attorneys for Plaintiff in Error and Appellant.
EDMUND W. VAN DYKE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

CONTENTS.

Page.

Statement of proceedings 1
Assignment of Errors 6
Additional assignment 8
Argument 9
The provisions of the Civil Code 11
Point I. The courts below were without, and erred in assuming, jurisdiction to determine whether any, and if so what, conjugal partnership property existed, or, on finding that any did exist, to order a division thereof between the parties, since the proceeding for divorce and the proceeding to secure a separation of the property were required by law in the Philippines to be instituted, if at all, in separate actions, and they were, therefore, improperly joined 16
Point II. The special judge who rendered the decision purporting to be that of the Court of First Instance of Iloilo in the branch of the proceedings that relates to the separation of the conjugal partnership property, and which is now here for review, was not properly designated and empowered, nor did he afterwards properly qualify himself, to act. He was, therefore, without jurisdiction, and, as a consequence, the Supreme Court of the Islands had no jurisdiction, to affirm the judgment based on his decision 34
Point III. The retrial in the Court of First Instance with respect to the existence and value of the conjugal partnership property and the amount divisible between the parties was not in conformity with law, in that the case was not decided by the judge who presided at the retrial, and before whom the witnesses appeared, but by another judge, before whom

Page.

not a single witness appeared, and who was specially assigned to the case when the trial judge had resigned his office without having announced a decision. 39

Point IV. The courts below erred in attempting to liquidate the claim of the wife to a share in the conjugal partnership property as of July 5, 1902, the date of the judgment of divorce. The judgment with reference to the wife's claim to such share was a mere money judgment. There should have been an order or decree of separation of the property in question as required by law and the liquidation should have been made as of the date of that order or decree. In the absence thereof, neither the Court of First Instance of Iloilo nor the Supreme Court of the Islands had jurisdiction to render any judgment whatever in this branch of the case 47

Point V. The Supreme Court of the Islands (assuming, for the purposes of argument, that it had jurisdiction) erred in not reversing the Court of First Instance because of the failure of that court to make up, or cause to be made up, an inventory of the sort required by the provisions of law under which these proceedings were instituted; also in sustaining the holding of that court to the effect that an alleged share in the supposed profits of a firm to which appellant belonged was property in his possession, though there was no proof of the existence of such profits at the time of the trial or rendition of the judgment; also in affirming that part of the judgment of the Court of First Instance which includes in the award to the wife an amount arrived at by an attempt to compute profits of said firm based on mere conjecture 52

Page.

Point VI. The court below erred in affirming that part of the judgment of the Court of First Instance of Iloilo, rendered in 1910, that allows interest on the amount stated therein from July 5, 1902 66

Conclusion 73

AUTHORITIES CITED.

Behn, Meyer & Co. v. Campbell, 205 U. S., 402 17, 35, 39, 53

Chew Heong v. United States, 112 U. S., 436 29

Codigo Civil Interpretado por el Tribunal Supremo, El— by Martinez Ruiz, vols. I and IX 20, 50

Comentarios al Codigo Civil Español—by José Maria Manresa y Navarro, vols. I and IX 21, 22, 49, 61

Cyclopædia of Law and Procedure, vol. 23 30

De la Rama v. De la Rama, 201 U. S., 203 1

Encyclopædia of Pleading and Practice, vol 1 30

Garrozi v. Dastas, 204 U. S., 64 68

Gsell v. Insular Collector, 239 U. S., 93 .....17, 28

Ill. Cent. R. R. Co. v. Turrill, 110 U. S., 301 71

Kneeland v. Am. Loan & Trust Co., 138 U. S., 509 .. 70

Mansfield, &c. Ry. Co. v. Swan, 111 U. S., 379 28

Minnesota v. Hitchcock, 185 U. S., 382..... 28

Thomas v. Board of Trustees, 195 U. S., 207 28

United States v. Levois, 17 How. 85 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 216.

ESTEBAN DE LA RAMA, *Plaintiff in Error and Appellant,*

vs.

AGUEDA BENEDICTO DE LA RAMA, *Defendant in Error and Appellee.*

BRIEF FOR PLAINTIFF IN ERROR AND APPELLANT.

STATEMENT.

This case was brought to this court by both writ of error to, and appeal from a final judgment of, the Supreme Court of the Philippine Islands. In one of its principal phases it was before this court on a former appeal (201 U. S., 203).

The proceeding is by a wife against her husband, under

the provisions of the Civil Code of Spain that was put in effect in the Islands by royal decree and remained in effect at the time the action was begun, and was originally both for divorce—which was granted, and which was the subject of the former appeal to this court—and for a separation and distribution of the conjugal partnership property. Plaintiff also prayed for a "pension" (alimony) *pendente lite,* attorney's fees and costs. It is with reference to the questions involved in the prayer for the division of the conjugal partnership property, etc., that the decision of the court below is now here for review.

In the complaint, which was filed in the Court of First Instance of the Province of Iloilo, Island of Panay, on the 29th of October, 1901, it was alleged, in substance, that the parties were married in the town of Vallodolid, Province of Occidental Negros, on the 9th of July, 1891, and that no offspring resulted from the union; that, some time in August, 1892, the defendant, intentionally and without any reason therefor, had abandoned the plaintiff and ever since had continued to live apart from her without cause or sufficient reason, and against her will and without her consent.

It was further charged that, at various times and places and on many occasions, the defendant committed adultery with the three women named in the complaint, and that by each of them he had had a child; that, considered in connection with the birth of the children, the acts of infidelity referred to in all three of these instances, caused "public scandal and contempt" for the plaintiff (in the absence of which latter element she would not, under the provisions of the Code, have been entitled to divorce). There were no allegations to the effect that there was in fact any conjugal partnership property to divide (R., pp. 1-4, inc.), only a prayer for such division.

In his answer the defendant admitted his marriage with the plaintiff, but denied that he had abandoned and that he had afterwards lived apart from her without sufficient cause. He alleged that, on the contrary, he expelled her from his house as unworthy, explaining that he married her "simply to protect the honor that she had confided to him and which she was later unable to preserve"; that the allegations in the complaint respecting adultery by him were untrue; that, "even if they were true, they are nothing but the necessary consequence of the unqualifiable conduct of the plaintiff"; that plaintiff herself is "convicted of having committed adultery, and that the said adultery was the reason why the defendant turned her out of his house as being unworthy."

After having made specific his charge in that respect, he alleged that his income was only 450 pesos a month, which he said was paid him for his services as manager of the firm of Hijos de I. de la Rama, of which he was a member; that "this amount is absolutely necessary to enable him to live in decency and in the style that his position as manager demands"; that the plaintiff had sufficient means of her own to enable her to live in comfort and had no need of any one to support her, and that no conjugal partnership property of any sort had ever been acquired (*id.*, pp. 4, 5). This last statement he was afterwards permitted to modify by the allegation that "during the marriage there has been no succession and that both parties to it, after living separately, have acquired some properties" (*id.*, p. 38). Like plaintiff, he prayed for legal separation (there was no provision in the Code for absolute divorce), but asked the court to decree that there was not, and never had been, any property held in common with the plaintiff and that he be not required to support her (*id.*, p. 4).

For some reason not stated in the record, when the case

came on for trial the Judge of the Court of First Instance of Iloilo excused himself and the hearing was by Judge Odlin of the Court of First Instance of Manila, sitting as a special judge in the city and Province of Iloilo (*id.*, pp. 6, 21). Of the adultery alleged the court found the defendant guilty but held, in effect, that the defendant's charge by way of recrimination had not been sufficiently substantiated by the evidence.

Respecting the other branch of the case, the holding was that, notwithstanding defendant's allegation to the contrary, certain funds and property had been acquired by him in which plaintiff had rights as his conjugal partner and it was adjudged that he pay her, as her share, the sum of $81,042.76, Mexican money, and $3,200, Mexican money, as an allowance for her support since the date of the institution of the proceeding, besides the costs of suit. To that judgment defendant excepted (*id.*, pp. 21, 22) and moved for a new trial (*id.*, pp. 24, 25), which motion was overruled (*id.*, p. 25), and the case was taken to the Supreme Court of the Islands, where the decision of the Court of First Instance was reversed. (The opinion is not quoted in the record, but is reported in 3 Phil. Rep., 34.)

In stating its reasons for reversing the Court of First Instance, the Supreme Court of the Islands said, in substance, that according to its view of the evidence both plaintiff and defendant had been proven guilty of adultery and that, therefore, neither was entitled to a divorce. "The result," the court added, "makes it unnecessary to consider that part of the judgment which relates to the settlement of the conjugal partnership."

Thereafter a motion for rehearing was submitted by plaintiff (R., p. 26) and denied (*id.*, p. 28) and plaintiff prayed an appeal to this court (*id.*, pp. 29, 30), which was allowed (*id.*, p. 32); and this court, having first considered

certain questions as to its power to review a decision of the court below in a divorce case, held that it had jurisdiction and reversed the decision of the Supreme Court of the Islands for the reason that it had "reached the conclusion that there is no such preponderance of evidence in favor of the theory of plaintiff's guilt as authorized the Supreme Court" (of the Islands) "to set aside the conclusions of the court below upon the ground that those findings were plainly and manifestly against the weight of the evidence" (201 U. S., 302).

Referring to the branch of the case that is now at bar, the court said that "while the right of the plaintiff to her proportion of the conjugal property, to alimony pending suit and to other allowances claimed is the basis of our jurisdiction, the decree of the Supreme Court " (of the Islands) "in dismissing plaintiff's petition renders it unnecessary to review the action of the Court of First Instance in fixing the amount that it held plaintiff was entitled to recover. We are, therefore, of opinion that the decree of the Supreme Court" (of the Islands) "dismissing the action must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion."

The case having thereupon been sent back to the Supreme Court of the Philippines, plaintiff presented a motion that the judgment of the trial court be affirmed as a whole (R., pp. 36, 37). In overruling it the upper court explained that "the claim of the appellant is now, however, that the whole case was finally disposed of by the decision of the latter court" (the Supreme Court of the United States) "and that the only thing remaining for this court to do is to affirm the judgment of the Court of First Instance in its entirety."

"With this view," the court went on to say, "we can not agree," then indicated that the method employed by the

Court of First Instance to ascertain what constituted the conjugal property was wrong and that the evidence presented was not sufficient to warrant the judgment, and sent the case back to that court "for the purpose of liquidating in this action the affairs of the conjugal partnership (considering the same to have been dissolved on the 5th of July, 1902) in accordance with the rules laid down in the Civil Code, and a judgment will be entered in that court for the amount which appears from such liquidation to be due from the defendant to the plaintiff."

A new trial was had in December, 1907, before the Hon. W. F. Norris, at the time Judge of the Court of First Instance of Iloilo, but Judge Norris resigned before arriving at a decision and on the 28th of April, 1909, his successor, Judge Ross, believing himself disqualified, issued an order designating Judge McCabe of the Tenth Judicial District to take charge of the case and dispose of it (*id.*, p. 38).

The judgment this time was for 58,543.37 pesos, with interest at the rate of six per cent per annum from July 5, 1902, the date of the judgment of divorce (*id.*, p. 49). Both parties excepted and moved for a new trial and both motions were denied (*id.*, p. 50), whereupon both parties appealed to the Supreme Court of the Islands (*id.*, pp. 51, 56), where the judgment of the Court of First Instance was affirmed (*id.*, pp. 52 *et seq.*), and, on denial of a motion for a rehearing, the case was again brought to this court (*id.*, pp. 61 *et seq.*).

With his petitions for writ of error and allowance of appeal (*id.*, pp. 61, 64) plaintiff filed the following

ASSIGNMENTS OF ERRORS.

1. The court erred in holding that the marriage between the plaintiff and defendant was dissolved July 5th, 1902.

2. The court erred in liquidating the conjugal property as of July 5th, 1902.

3. The court erred in not requiring an inventory to be made of the conjugal property as provided in Book 4, Chapter 5, Section 7, of the Civil Code. (Articles 1438 *et seq.*)

4. The court erred in liquidating the conjugal property without an inventory as provided in Book 4, Chapter 5, Section 7, of the Civil Code. (Articles 1418 *et seq.*)

5. The court erred in finding that the conjugal property could not be divided in kind.

6. The court erred in not dividing the conjugal property in kind as provided in Article 1426 of the Civil Code.

7. The court erred in making findings respecting the profits made by the partnership Hijos de I. de la Rama, whereon to base a judgment against the defendant, without requiring said partnership to be made a party.

8. The court erred in holding that there is evidence to support the finding that the conjugal property in the possession of the defendant on the 5th of July, 1902, was of the value of P. 117,086.75.

9. The court erred in holding that the entire share of the defendant in the profits of the partnership Hijos de I. de la Rama from June 30, 1900, to June 30, 1902, constituted conjugal property in the possession of the defendant without proof of their actual existence on the day of the trial of the cause or the day of the rendition of the judgment.

10. The court erred in finding that the firm of Hijos de I. de la Rama made profits during the year ending June 30, 1902.

11. The court erred in basing its judgment against the defendant in part on conjectural profits of the firm of Hijos de I. de la Rama for the year ending June 30, 1902.

12. The court erred in allowing interest on its judgment from July 5th, 1902.

ADDITIONAL ASSIGNMENTS.

(A) The courts below were without, and erred in assuming, jurisdiction in the case at bar to determine whether any, and if so, what, conjugal partnership property existed, or, on finding that any did exist, to order a division thereof between the parties, since the proceeding for divorce and the proceeding to procure a separation of the property were required by law in the Philippine Islands to be instituted, if at all, in separate actions and they were, therefore, improperly joined.

(B) The Special Judge who rendered the decision purporting to be that of the Court of First Instance of Iloilo in the branch of the proceedings in the case at bar that relates to the separation of the conjugal partnership property, and which is now here for review, was not properly designated and empowered, nor did he afterwards properly qualify himself, to act. He was, therefore, without jurisdiction in the matter, and, as a consequence, the Supreme Court of the Islands had no jurisdiction to affirm the judgment based on his decision. That judgment ought, on the contrary, to have been set aside and the Court of First Instance of Iloilo ought to have been ordered to proceed in accordance with the mandate theretofore issued and in conformity with the law relating to such procedure.

(C) The retrial in the Court of First Instance of Iloilo with respect to the existence and value of the conjugal partnership property and the amount divisible between the parties was not in conformity with law, in that the case was not decided by the judge who presided at the retrial, and before whom the witnesses appeared, but by another judge, before whom not a single witness appeared, and who was specially assigned to the case when the trial judge had resigned his office without having announced a decision.

For this reason (assuming, for the purposes of argument, that the courts below had jurisdiction), the Supreme Court of the Islands erred in not sending the case back to the Court of First Instance of Iloilo for proper hearing and disposition.

ARGUMENT.

The case at bar presents a striking instance of that failure of prompt justice which can result from erroneous interpretation and application of the law. In saying this, it is not our purpose, of course, to impute to the courts below any lack of research or proper effort to ascertain the intention the legislators sought to express in the various provisions of the codes that were in effect in the Philippines at the time this proceeding was begun, or to apply all the provisions that were applicable and all other appropriate principles, to the state of affairs that was disclosed by the evidence. On the contrary, all five of the opinions delivered below are unusually full and elaborate and appear to have been well considered and prepared with great care.

We assume, therefore, that any errors into which the courts below may have been led are attributable rather to the confusion that must necessarily have been caused by the change in sovereignty in the Islands and the consequent change in the systems of judicature and general practice before the courts, for we think it should be borne in mind that this suit was brought in the very beginning of this period of transition, only a few weeks after the abolishment of the Spanish tribunals and the substitution of the American, and within a month after the American Code of Civil Procedure went into effect; and besides, the American courts have seldom been called on to consider cases of this character, the law relating to which is so different from that in effect in the greater part of the United States.

But the fact remains—and this is shown conclusively by the several reversals that have already occurred in the case—that the courts below have from the first persisted in disregarding provisions both of the Civil Code of Spain that remained in effect and of the American Code of Civil Procedure that superseded the Spanish procedural code; that they have utterly misconceived, not alone the theory of the law and the intention of the legislators, both Spanish and American, but the rights and means of enforcing them, to which the parties were lawfully entitled. The fact remains that, in order to establish those rights and maintain them in the courts, the parties herein—first one and then the other, and on one occasion simultaneously—have been compelled to resort to appeal, and that, as a consequence, this litigation has already continued nearly fifteen years.

And counsel for plaintiff in error and appellant are confident that it will be clear from what will be brought to the attention of the Court in this brief that, notwithstanding the consideration that had already been given the case in the previous proceedings, the Supreme Court of the Islands erred in affirming what purports to be a judgment of the Court of First Instance of Iloilo that was rendered after the retrial of the branch of the case with which we now have to deal, and which is now before this court for review.

For the convenience of the court, we think it well, before entering upon our argument of the points involved, to insert the following collection of provisions of the Civil Code in effect in the Philippines at the time of the institution of these proceedings:*

*We quote from Part 1 of House Doc. No. 1484, 60th Cong., 2nd Sess., which contains the War Department's "Translation of the Civil Code in force in Cuba, Porto Rico and the Philippines."

1. *As to marriage.* "The law recognizes two forms of marriage: the canonical, which all who profess the Catholic Religion must celebrate, and the civil, which shall be celebrated in the manner prescribed in this Code" (Art. 42).† "Civil or canonical marriage shall produce no civil effects when either of the spouses is already legally married" (Art. 51). As will be seen, though divorce may "suspend the life in common," the spouses continue legally married until released by death. Marriages are void when celebrated under the circumstances stated in Article 101 and may be annulled by the courts (Art. 103), and the conjugal partnership in property may be dissolved (Art. 1417), but marriage itself, as just stated, "is dissolved by the death of one of the spouses" (Art. 52).

2. *As to divorce.* "The cognizance of suits for annulment and divorce, in cases of canonical marriage, pertains to the ecclesiastical tribunals" (Art. 80).‡ "A final decree of annulment or divorce of a canonical marriage shall be entered in the civil registry and shall be presented to the ordinary tribunal for the purpose of requesting its enforcement in the part relating to its civil effects" (Art. 82). "Divorce only produces the suspension of the life in common of the spouses" (Art. 104). "The legitimate causes for divorce are: 1. Adultery on the part of the wife in every case and on the part of the husband when public scandal or contempt of the wife results therefrom" (Art. 105), etc. "A decree of divorce shall produce the following effects: 1. Separation of the spouses. * * * 4. The separation of the property of the conjugal partnership and the loss of the administration of that of the wife

†The validity of the marriage has not been brought in question in the case at bar. This is inserted merely by way of explanation.

‡The jurisdiction of the ecclesiactical tribunals had been superseded by that of the courts established under the American régime at the time of the bringing of this suit.

if the husband should have it and is the one who gave cause for the divorce," etc. (Art. 73).

3. *As to the conjugal property.* "All the property of the marriage shall be considered as partnership property until it is proven that it belongs exclusively to the husband or to the wife" (Art. 1407). "By virtue of the conjugal partnership, the earnings or profits indiscriminately obtained by either of the spouses during the marriage shall belong to the husband and the wife, share and share alike, upon the dissolution of the marriage" (Art. 1392) or on the dissolution of the conjugal partnership (Art. 1433). "To the conjugal partnership shall belong: 1. Property acquired for a valuable consideration during the marriage at the expense of the partnership property, whether the acquisition is made for the partnership or for one of the spouses only. 2. That obtained by the industry, salaries or work of the spouses, or either of them. 3. The fruits, income or interest collected or accrued during the marriage, coming from the partnership property, or from that which belongs to either of the spouses" (Art. 1401). "The fruits of the paraphernal property" (see definition *infra*) "form a part of the assets of the conjugal partnership and are liable for the payment of the marriage expenses" (Art. 1385).

4. *As to administration of the conjugal property.* "Persons who may be joined in matrimony may before celebrating it execute contracts stipulating the conditions for the conjugal partnership with regard to present and future property without any other limitations than those mentioned in this Code. In the absence of contracts relating to property, it shall be understood that the marriage has been contracted under the system of legal conjugal partnership" (Art. 1315). "The husband is the administrator of the property of the conjugal partnership except when the contrary is stipulated and in the case of Article 1384," relating

to bankruptcy, etc. (Art. 59). "Besides the powers the husband has as administrator, he may alienate and encumber, for a valuable consideration, the property of the conjugal partnership without the consent of the wife," etc. (Art. 1413). "The wife can not bind the property of the conjugal partnership without the consent of her husband" (Art. 1416), except as provided in Articles 1362, 1441 and 1442," *i. e.*, for necessaries, when the administration is transferred to the wife, etc.

5. *As to the obligations of the conjugal partnership.* "The conjugal partnership shall be liable for: 1. All the debts and obligations contracted during the marriage by the husband and also for those contracted by the wife in the cases in which she can legally bind the partnership," as above. "2. The arrears of interest, matured during the marriage, of obligations which affect the private property of the husband or the wife. Extensive repairs shall not be chargeable to the partnership. 4. Extensions or minor repairs to the property of the partnership. 5. The support of the family and the education of the children in common and of the legitimate children of one of the spouses only" (Art. 1408).

6. *As to the separate property of the spouses.* "The following is the separate property of each of the spouses: 1. That brought to the marriage as his or her own. 2. That acquired for a good consideration by either of them during the marriage. 3. That acquired by right of redemption or by exchange for other property belonging to one of the spouses only. 4. That bought with money belonging exclusively to the wife or to the husband" (Art. 1396). The first subdivision includes the wife's "dowry" and "paraphernal property" (Arts. 1336 *et seq.* and 1381 *et seq.*), but not the income therefrom (Arts. 1385 and 1401). "Dowry is composed of the property and rights brought, as

such, by the wife to the marriage at the time of contracting it and of those which she acquires during the same by gift, inheritance or legacy, as dowry property" (Art. 1336). "Paraphernal property is that which the wife brings to the marriage without being included in the dowry and that she may acquire after the creation of the same without being added thereto" (Art. 1381). The husband's separate property is called his "capital" (Art. 1398).

7. *As to the dissolution of the conjugal partnership.* "The conjugal partnership expires on the dissolution of the marriage" (by death) "or when it is declared void. * * * The conjugal partnership shall also terminate in the cases mentioned in Article 1433" (Art. 1417). Article 1433 and the one just preceding it read: "In the absence of a specific declaration in the marriage contract, the separation of the property of the spouses during the marriage shall not take place except by virtue of a judicial decree. * * * The husband and the wife may request the separation of the property, and it shall be decreed, whenever the spouse of the plaintiff should have been condemned to a penalty which includes civil interdiction, or should have been declared an absentee, or should have given cause for divorce. In order that the saparation may be decreed, it shall be sufficient to present the final judgment rendered against the guilty or absent spouse in each one of the three cases above mentioned."

Article 1434 provides that "after the separation of the property has been ordered, the conjugal partnership shall be dissolved and its liquidation shall be made according to the provisions of this Code." Article 1437 provides that "the suit for separation and the final judgment declaring it, when involving real property, must be entered and recorded, respectively, in the proper registries of property." (According to the definition of "real property" given in

Article 334, much more is comprehended in the term as here used than in the use we make of it in this country.)

8. *As to liquidation.* "Upon the dissolution of the partnership an inventory shall immediately be made, but the same shall not be required for the liquidation: 1. When after the partnership has been dissolved one of the spouses, or his or her legal representatives, have at the proper time renounced its effects and consequences. 2. When the separation of the property may have preceded the dissolution of the partnership. 3. In cases to which the second paragraph of the preceding article refers" (Art. 1418), *i. e.,* where one of the spouses, because of bad faith in causing the annulment of the marriage, is not to receive his or her distributive share. "The inventory shall include specifically, for the purpose of collating them, the sums which, having been paid by the conjugal partnership, are to be deducted from the dowry or from the capital of the husband in accordance with Articles 1366, 1377 and 1427" (Art. 1419).

"After the inventory has been concluded, the dowry of the wife shall first be liquidated and paid, according to the rules which for its restitution are fixed in Section 3, Chapter 3, of this Title, and subject to the provisions of the following Articles" (Art. 1421). "After the dowry and the parapherna of the wife have been paid, the debts, charges and obligations of the partnership shall be paid," unless "the inventoried estate shall not be sufficient to satisfy all the provisions of this and the preceding Article," etc. (Art. 1422). "After the debts, charges and obligations of the partnership have been paid, the capital of the husband shall be liquidated and paid, insofar as the inventoried estate may reach, making the proper deductions according to the same rules which are prescribed in Article 1366 with regard to dowry" (Art. 1423).

9. *As to distribution.* "After the deductions from the

inventoried estate specified in the three preceding Articles have been made, the remainder of the same estate shall constitute the assets of the conjugal partnership" (Art. 1424). "The losses or deterioration which the personal property belonging to either of the spouses may have suffered, even though by a fortuitous event, shall be paid out of the conjugal property, should there be any" (Art. 1425). "The net remainder of the partnership property shall be divided, share and share alike, between the husband and wife or their respective heirs" (Art. 1426). "The separation of the property shall not prejudice rights previously acquired by creditors" (Art. 1438).

POINT I.

THE COURTS BELOW WERE WITHOUT, AND ERRED IN ASSUMING, JURISDICTION IN THE CASE AT BAR TO DETERMINE WHETHER ANY, AND, IF SO, WHAT, CONJUGAL PROPERTY EXISTED, OR, ON FINDING THAT ANY DID EXIST, TO ORDER A DIVISION THEREOF BETWEEN THE PARTIES, SINCE THE PROCEEDING FOR DIVORCE AND THE PROCEEDING TO SECURE A SEPARATION OF THE PROPERTY WERE REQUIRED BY LAW IN THE PHILIPPINES TO BE INSTITUTED, IF AT ALL, IN SEPARATE ACTIONS, AND THEY WERE, THEREFORE, IMPROPERLY JOINED.

It is true that this point was not made the subject of an assignment of error either in the petition for writ of error (R., p. 61) or in that for the allowance of an appeal (*id.*, p. 64) from the judgment of October 30, 1913, (*id.*, p. 60), the one last rendered by the Supreme Court of the Philippine Islands in this case. The question had been raised, however,

(*id.*, p. 16), and the adverse decision of the Court of First Instance thereon duly excepted to (*id.*, p. 22), and was afterwards considered by the Supreme Court of the Islands when, after the disposal of the appeal in the matter of the divorce, the case was remanded by this court for further proceedings in conformity with the opinion (7 Phil. Rep. 745).

The error here involved is one, therefore, as it seems to counsel for plaintiff in error and appellant, that is manifest on the face of the record, and the failure of the Supreme Court below, it is respectfully submitted, to hold that the suit ought to have been dismissed by the Court of First Instance—or to hold, at least, that that part of the demand of the plaintiff which relates to the separation of the conjugal partnership property ought to have been dismissed—is error of which this court may take cognizance even though such error was not mentioned in the assignments referred to. In the case of *Behn, Meyer & Co.* v. *Campbell* (205 U. S., 402), wherein a somewhat similar situation arose, this court said (p. 409):

> "It is provided in the act giving this court jurisdiction to review the judgments of the Supreme Court of the Philippine Islands that they may be reviewed here 'in the same manner, under the same regulations, and by the same procedure, so far as applicable, as the final judgments and decrees of the Circuit Courts of the United States.' In such cases *alleged errors not stated in the assignment of errors filed with the petition for the writ have sometimes been considered.* The limit of this practice is accurately stated in the 35th rule of this court. There it is said that if the errors are not assigned with the petition for the writ, they will be disregarded, *except that the court, in its option, may notice a plain error not thus assigned.*"

And in another Philippine case, decided the 15th of November last at the present term (*Gsell* v. *Insular Collector*

of Customs, 239 U. S., 93) notwithstanding the fact that counsel for the Insular Collector made no mention of the point in his briefs, the court, on its own initiative, raised a question of jurisdiction and "reached the conclusion that the writ of error by which it is sought to review the judgment of the Supreme Court of the Philippines in this case should be dismissed." and it was so ordered. It is believed by counsel for plaintiff in error and appellant in the case at bar, therefore, that they may with propriety, as they do with confidence in the merit of the contention, pray the court to consider the following:

During the last few years of the Spanish régime in the Philippines and for a while under the American régime, two Spanish codes were in effect. One is known as the Civil Code. This contains the substantive law and is the one from which we have quoted the above provisions. The other was known as the Code of Civil Procedure—though the procedure with respect to the matter here in question was not prescribed in this latter code but in the one that embodied the substantive law itself, *i. e.*, the Spanish Civil Code.

At the time of the filing of the complaint in this case (October 29, 1901), the Spanish Code of Civil Procedure had been repealed and superseded as a whole by a new code that had been enacted by the Commission established under the American régime (see Sec. 795, Act No. 190, Public Laws, U. S., Philippine Commission, vol. I, p. 580). With the exception, however, of a few provisions that had been superseded by other acts of the Commission, the Spanish Civil Code above referred to (the one containing the substantive law and practice in cases of this character) was still in effect, including all but one of the provisions relating to divorce and relating to proceedings to procure separation of conjugal partnership property, for in the Commission's Code of Civil Procedure no provision whatever was made

for the procedure in such cases (see Act just cited, wherein the American Code is contained).

The only step in the procedure that had been changed, so far as counsel for plaintiff in error and appellant have been able to find, is the one whereunder suits for divorce, in cases of canonical marriage, were filed in the ecclesiastical instead of in the civil courts. Nevertheless, it is clear, as it seems to us, from this very provision no less than from the ones that remained in effect that *it was the intention of the lawmakers that in all cases suits for divorce and suits for separation of conjugal partnership property should not be included in the same proceedings;* and we think that from the other considerations we are about to present it will also be perfectly clear to the court that a suit the purpose of which is to ascertain whether or not any such property in fact exists, and, if so, what amount is divisible between the parties ought not, on general principles, to be joined with a suit for divorce.

It appears that this was the construction actually placed on the law prior to the bringing of the suit in the case at bar. This was admitted by Judge Odlin in his decision following the first trial. He said that "according to the practice which prevailed in the Philippine Islands previous to October 1st, 1901" (the day the present Code of Civil Procedure became effective), "the court, in an action of divorce, merely passed upon the question as to whether the divorce should be granted. After a decree of divorce had been granted by the court, under the old practice, *a separate suit was necessary for the division or separation of the properties which might constitute the conjugal partnership.*"

And this, as we have already intimated, must necessarily have been the intention of the lawmakers; otherwise it would not have been provided in Article 80 that "the cognizance of suits for annulment and divorce, in cases of

canonical marriages, pertains to the *ecclesiastical* tribunals," but that (Article 82) "a final decree of annulment or divorce of a canonical marriage shall be entered in the civil registry and *shall be presented to the ordinary tribunals for the purpose of requesting its enforcement in the part relating to the civil effects.*" What else could possibly have been contemplated? And, in this connection, it will be noted that the only distinction that is made between the two classes of cases is that in cases of canonical marriage the ecclesiastical courts are given jurisdiction of the question of divorce, not of the matter of enforcement of the civil effects. As will presently be seen, with respect to such enforcement, the practice prescribed for both classes of cases is the same.

The provisions of the Civil Code of Spain (which at the time of the beginning of this action were identical with those in effect in the Philippines, see Royal Decree of July 31, 1889, quoted in House Document No. 1484, cited *supra*) have been explained and commented on by eminent authorities, among them Dr. Antonio Martinez Ruiz, sometime President of the Audiencia of Orense, and Dr. José Maria Manresa y Navarro, a member of the Spanish General Commission on Codification and formerly of the Supreme Tribunal of that country, now retired with the rank of President. Of the two articles above referred to, Dr. Ruiz says in Volume I, page 396, of his work on the Civil Code as interpreted by the Supreme Tribunal (*El Codigo Civil Interpretado por el Tribunal Supremo,* Barcelona, 1908):

> "The first two of the foregoing Articles" (80 and 81) "constitute the rules as to competency with relation to matters that have not and can not give rise to any question, because of the clearness of their text, and it is not strange that the body of the jurisprudence records no case. Article 82, recognizing in ecclesiastical tribunals competency to resolve and decide as

> to nullification and divorce of canonical marriages, could not extend that competency to the civil effects and it orders that parties shall have recourse to the ordinary tribunals for such decisions insofar as they refer to those effects."

Dr. Manresa says in Volume I, page 396, of his *Comentarios al Codigo Civil Español* (Madrid, 1905):

> "Article 80, the natural and logical consequence of Article 75, refers at the beginning of the chapter dealing with canonical marriage to the Council of Trent, which declares (Canon XII, Session 24) that 'if any one shall say that matrimonial causes do not belong to the ecclesiastical judges, he shall be excommunicated'—a principle that also inspired the decree of February 9, 1875, and Article 24 of the Instructions promulgated for its execution; but, as the petition for nullification or divorce originates within the family, an abnormal and strange situation arises that calls for the adoption of urgent measures, and, to regulate it appropriately in the form determined in Article 68, the interested parties must resort to the civil tribunal for action."

But, as the court will doubtless have observed, the provisions regulating the procedure for the separation of the conjugal partnership property, whether in cases of canonical marriage or not, prescribe (Art. 1433) that, "in the absence of specific declaration in the marriage contract, the separation of the property of the spouses during the marriage shall not take place except by virtue of a judicial decree"; that such separation may be requested (*id.*), and that "it shall be decreed, whenever the spouse of the plaintiff should have been condemned to a penalty which includes civil interdiction, or should have been declared an absentee, or should have given cause for divorce"; that,

"in order that the separation may be decreed, it shall be sufficient to present the final judgment rendered against the guilty or absent spouse" in any one of the three cases mentioned; and all this is made still clearer by Article 1437, which provides that "the suit for separation and the final judgment ordering it"—not the suit and final judgment of divorce—shall, "when involving real property, be entered and recorded, respectively, in the proper registries of property."

Commenting on these provisions in Volume IX of his work on the Code (pp. 769 *et seq.*), Dr. Manresa says:

> "Neither the penalty of civil interdiction nor the declaration of absence nor the decree of divorce produces by itself alone the separation of the property of the marriage. The law heeds above all the volition of the innocent or present spouse and concedes to them that right in order that, at their arbitrary will, they may or may not make use of it, that they may petition or refrain from petitioning, but preserving in their cases the solemn declarations of the tribunals that review such important and transcendental facts as to the authenticity, publicity and justice necessary, to the end that they shall produce the extraordinary effects that such declarations should produce.
>
> "The will of the present or innocent spouse is, then, by itself alone, ineffective. The will or decisions of the tribunals, by themselves alone, are also ineffective, notwithstanding the gravity of the facts or causes that may constitute the reason for the separation. The party in interest must ask for it and the tribunal must grant it. By what steps? Before what judge? By virtue of what resolution?" (*i. e.*, by virtue of what form of announcement of the judicial determination?)
>
> "The law, in Article 1433, says only: in order that the separation may be decreed, it shall be sufficient to present the final judgment that may be rendered

against the guilty or absent spouse in any one of the three cases mentioned. Interpreting this Article singly, its meaning is simple. There is no necessity for specially judging some one. Already the penalty of interdiction has been imposed, or the absence has been declared, or the divorce has been decreed: facts completely justified by the final judgment that has been rendered. Of these facts is born the right, voluntary in the present or innocent spouse, to petition for the separation.

"To the tribunal, therefore, it is enough to know that the will is expressed in the petition addressed thereto and to be assured that a legal cause exists for the separation, through the decree of divorce, the declaration of absence or the imposition of the penalty of interdiction. It seems to be a species of execution of judgment, because the legal effect of the judgment rendered in each case is the right to petition for a separation of the property. Nothing of hearing of the guilty spouse or other persons, nothing of useless steps, no further proof than the judgment itself; the petition justified, next the resolution decreeing the separation, without power in the tribunals to deny it, always when in compliance with the legal prescription."

In the part of his work quoted above, the Commentator intimates by the remark: "interpreting this Article (1433) singly, its meaning is simple," that, considered in connection with some other article, its meaning may not be so simple. What he had in mind, however, does not in any way qualify the above stated conclusions. As appears from what follows, it had to do only with the form of announcement of the determination of the court as to the separation of the property. "If this is what Article 1433 has to say," he continues "there is another, Article 1437, according to which the demand for the separation and the final judg-

ment in which it is declared must be noted and recorded, respectively, in the registry of property."

"This gives the matter much greater proportions," he goes on to say. "Article 1437 appears to require formal demand, declarative decision and solemn judgment. What is to be deduced from all this?" Then, for purposes of comparison, he refers to provisions in the codes of other countries and argues that, although they (following the French Code) require solemn judgment, such provisions permit petitions in cases of maladministration of the conjugal estate, in which event it would be necessary, of course, to *prove* the maladministration, a necessity that distinguishes such cases from the three provided for in the articles here in question, for in the latter it is contemplated that at the time the petition for separation of the property shall be filed, the right to such separation shall already have been established by the imposition of the penalty of civil interdiction, the declaration of absence or the decree of divorce. He adds:

> "The right to petition for separation in cases of absence, divorce or civil interdiction is not complete through being something independent of those causes but is intimately leagued with them. The law does not exact, nor can exact, that the innocent or present spouse shall sustain two different and successive *judgments* for the purpose of obtaining the separation of the patrimonies, first one in order to obtain the divorce, for example, and afterwards another in order that the separation for that cause shall be decreed, because one, in brief, is the consequence of the other as one of its civil effects. *Nor can it be maintained that in cases of divorce and absence the petition in which the declaration of those facts is asked for and the judgment wherein they are established are equivalent to the petition and judgment for separation*, because it must

not be forgotten that the divorce is established before ecclesiastical tribunals and that the absence is, in a certain way, independent of the separation of the patrimonies.

"It must, therefore, be supposed that in Article 1437 the legislator employed the word 'judgment' (*sentencia*) and in Article 1432 the word 'decree' (*providencia*) as synonymous with 'resolution' (*acuerdo*) or 'judicial resolution' (*resolución judicial*). Wherefore, the same in the case of absence or divorce as in civil interdiction—a penalty that is the consequence of a serious crime, in the prosecution and punishment of which the innocent spouse does not intervene—if, *after the proper judgment shall have been rendered,* separation is asked for and Article 1432 must be applied, it is enough to present the executory judgment that declares the absence, decrees the divorce or imposes the penalty of interdiction, because those judgments shall then have been rendered with full knowledge of the cause and all the circumstances will have been therefore sufficiently sifted."

From the above there can be no question, we take it, that it is the opinion of this eminent author that although the separation of the conjugal partnership property may be a consequence, it is not a *necessary* consequence, of the judgment of divorce; that that judgment only confers *the right* to the separation; that whether recourse shall be had to that right is dependent upon the will or volition of the innocent party; that the proceeding to secure the separation, though in its nature dependent, is a *separate* proceeding; that, although no new trial of the question of the guilt of the defendant need be had, the innocent spouse must in any event *petition* for the separation and that that petition must recite a final judgment granting the divorce; that otherwise the court would have, and could have, no jurisdiction of the subject matter.

No such petition was filed, or in the circumstances, could possibly have been filed, in the case at bar. On the date of the petition that was filed by plaintiff there had been no judgment of divorce. That she was entitled to the divorce had not been proven. It was not even alleged in the petition that there was any conjugal partnership property; there was only the prayer for its separation. Unless, therefore, some change had been made in law as set forth in the above-quoted provisions, the conditions which, under the law, formed the basis of the court's jurisdiction—*i. e.*, the proving of the guilt of the defendant and promulgation of a final judgment establishing it—had not yet come into existence and there was nothing whatever to show that there was any property with reference to which the court could have acted even assuming that it had jurisdiction.

It would not seem to matter that there were in the Philippines at that time no ecclesiastical courts and that as a result suits for divorce in cases of both canonical and civil marriage were cognizable in the civil courts established under the American rule. In all other respects no distinction is made between the two classes of cases; it is clear that it was the intention of the lawmakers that the proceedings should be instituted separately and there were good reasons why they ought to be, and certainly the courts established under the American rule had not at that time (and have not since so far as we have been able to ascertain) been given specific jurisdiction by any act of the Philippine Commission or the Congress of the United States to determine questions of divorce and questions relating to the separation and liquidation of conjugal property in the same proceeding.

The Practice is Unchanged by Law.

Nevertheless, Judge Odlin added to the statement we have above quoted from his decision that:

> "It is my opinion that under the present practice no second suit is required, and this court has jurisdiction in the present proceeding to determine, not only the question of divorce or no divorce, but also to pass upon the question of the rights of both parties as to the division or separation of the property of the conjugal partnership. This view, furthermore, is evidently entertained by the contending counsel in this case, as the plaintiff especially prays for a division of the property and other relief of a similar character and her attorneys have presented an elaborate argument on this point; and the defendant himself, in his answer, although he prays for a judgment of divorce in his favor, specifically waives his consequent right to a separation of the conjugal partnership property by reason of his allegation that none exists."

It is respectfully submitted that what the Judge says in the last part of this paragraph is manifestly impossible. A waiver by implication, such as the allegation to which he alludes can only be construed to be, can not be specific. Nor, as it seems to counsel for plaintiff in error and appellant, can such a waiver, based on the mere statement that no property of the character referred to existed, properly be construed as an admission, either express or merely tacit, that the causes of action in this case were properly joined, since the statement is distinctly noncommittal.

But whatever significance may be attached to the pleadings and procedure of the parties themselves in the case, there would seem to be no doubt that neither party could have vested the court with jurisdiction of a combination of subjects-matter over which, so combined, jurisdiction

was not conferred on the court by law. This, in effect, was held in the case of *Gsell* v. *Insular Collector,* above cited, wherein this court, on its own initiative, raised a question of jurisdiction and denied that it had any, although no point had been made as to any lack thereof by counsel for the defendant in error. See also *Mansfield, etc., Ry. Co.* v. *Swan* (111 U. S., 379); *Minnesota* v. *Hitchcock* (185 U. S., 382), and *Thomas* v. *Board of Trustees* (195 U. S., 207).

With respect to the part of Judge Odlin's opinion in which it is stated that, under the practice at the time of the institution of the proceedings herein, no second suit was required, we presume that he had in mind the repeal of the old Spanish Code of Civil Procedure and the substitution of the Code of Civil Procedure that was enacted by the United States Philippine Commission and which became effective on the 1st of October, 1902—though the repeal of the old Spanish Code of Civil Procedure could not, considered alone, have had any effect on the practice, because it contained no provision in the remotest degree relating to that practice. That, instead of having been prescribed in the repealed Code, was prescribed in the Civil Code: the one containing the substantive law and which remained in effect.

The only provision that we have found in the Commission's Code of Civil Procedure that would seem to have any possible bearing on the question now being considered is one embraced in Chapter V, Section 20, which reads: "If the complaint contains more than one cause of action, each distinct cause of action must be set forth in a separate paragraph containing all the facts constituting the particular cause of action." *If* the complaint contains more than one cause, each must be set forth in a separate paragraph! That is all that is provided. There is nothing to indicate

that all sorts of actions might be joined—causes *ex contractu* with causes *ex delicto*, or inconsistent causes, causes affecting different defendants and the like.

There was nothing in the practice either in the Philippines or in the United States permitting causes of that character to be joined prior to the enactment of the new Code. What is there in the provision just quoted to permit it? At best it would appear to justify nothing more than a mere inference that it might possibly have been the purpose to repeal the former practice by implication; and no principle is better settled than that "repeals of statutes by implication are not favored and are never admitted where the former can stand with the new act but only where there is positive repugnance between the statutes or the latter is plainly intended as a substitute for the former" (*United States* v. *Levois*, 17 How., 85; *Chew Heong* v. *United States*, 112 U. S., 436).

Certainly nothing as vague as the provision referred to could be regarded as having been "plainly intended" as a substitute for the positive provisions of the Civil Code, and, since there are causes that may properly be joined and causes that may not be joined, it seems clear that the latter provisions may stand with the one in the Code that was enacted by the Commission, this being only, as already pointed out, that *if* more than one cause is set forth, each must be in a separate paragraph, and there being nothing to indicate that it was the intention that *all* sorts might be joined. And, because of that very vagueness and that very omission, it would seem to make no difference whether the provision in question could properly be regarded as a repeal of the Spanish Civil Code provisions or not, for if the latter could properly be held to have been repealed, it follows that there would have been no such thing in the Philippines at the time of the beginning of this suit—at

least with reference to joinder of causes of action—as a practice specifically provided by statute.

In that event, as we view the situation, the practice must either have reverted to that in effect under the Spanish régime, and which required separate suits in cases of this character, or that required by the common law, under the principles of which, in a case of this character, separate suits would also have had to be brought. "It is a well established principle of common law pleading," says the Cyclopædia of Law and Procedure, "that causes of action arising *ex contractu* may not be joined with causes arising *ex delicto*" (see the immense number of cases cited in the 23rd volume of that work at page 392), and this is true of the practice "even under the codes" of the States, "unless they arise out of the same transaction" (I Ency. Pldg. & Prac., 104.) It will hardly be contended, we imagine, that acts of adultery committed by a husband could in any way possibly form part of the same transaction whereby he becomes administrator of the property of a conjugal (in the nature of a business) partnership with his wife.

Nor would it seem that a contention would be well founded that might seek to establish any controlling analogy between proceedings like the one in the case at bar and our own combined action for divorce and alimony. In that sort of a case a different principle is involved. No accounting is required. There are no assets to be exactly ascertained and divided, share and share alike. The judgment of the court depends, not alone on what the husband may be shown to possess in the way of property or income, that is, on his ability to pay, but on the attending conditions as well: the social status of both wife and husband, their respective reasonable needs, whether there are children, which of the parties is given the custody of them, etc., and, if thereafter it should be shown that any sub-

stantial change in those conditions has occurred, and that, as a consequence, the amount of alimony awarded is too large or too small, the amount may be reduced or increased by supplementary decree, or the husband may be relieved of the obligation altogether on a proper showing that he ought not to be required to continue the payments.

In a case in this country in which, apart from the marriage contract, an actual industrial or business or property partnership exists between the husband and wife, we do not think that, under the holdings above referred to, a proceeding having in view the termination of that business partnership and an accounting, liquidation and distribution of the assets could be joined with an action for divorce, unless, of course, a joinder of actions of so different a character were clearly provided for in some statute. In the proceedings contemplated by the Spanish Civil Code, however, the court is required to ascertain exactly what are the assets of just such a partnership: an industrial, business or property partnership as distinguished from that involved in the ordinary contract of marriage as it exists under the laws of the United States, and is required further, when those assets shall have been ascertained, to award the wife a one-half share.

To accomplish this it is necessary that there shall be an exceedingly careful accounting, the dowry and paraphernal property of the wife and the capital of the husband must be ascertained, the debts and other obligations with which the partnership property is chargeable must be deducted, outstanding credits or amounts due the partnership must be computed, depreciation or losses between the date of the decree of divorce and that of the decree of separation of the property must be taken into consideration, an inventory must be made up—an inventory which, as Dr. Manresa says in the IXth volume of his *Comentarios al Codigo*

Civil Español (p. 685) "is the basis of the liquidation of the partnership property," an inventory which *"is of extraordinary importance,"* he adds, "and necessitates consummate care and a close examination of the whole life of the partnership."

There is, therefore, we respectfully submit, in a case like the one at bar every reason why such causes should not be permitted to be joined that exists with respect to cases arising under our own system of jurisprudence. Separation of the property, is by no means a *necessary* incident or consequence of a judgment of divorce. The relief sought in the two proceedings is of a totally different character. Interests of others than the offending spouse are involved, *i. e.*, the interests of creditors. In this case, there were also involved interests of the firm of Hijos de I. de la Rama, of which the husband was a member, and the failure to make that firm a party defendant is the subject of one of the assignments of error.

Also the defenses to which the husband is put, the testimony for and against him, the kind of evidence required, the manner of proving the issues, the nature of the causes of action themselves—all these are totally different. The trial of two such questions in the same proceeding might well lead to confusion or tend to obscure points of law or the merits of the showing made by one or the other of the parties, or both, in the mind of the trial judge or in the minds of the attorneys. Apparently that is exactly what happened in the case at bar, for the decision of Judge Odlin was reversed. And besides, as has been said above, the proceeding for the separation need not, under the law, and may perhaps never in any particular case, be resorted to, for of course, the species of moral obliquity that might induce a husband to commit adultery would not necessarily make him a bad administrator or warp his judgment, or

even affect his integrity, in affairs of finance or business.

It suggests itself that it may possibly be urged in reply to the foregoing that the plaintiff in error and appellant in the case at bar has not in fact, by reason of the misjoinder of causes of action herein, been deprived of any substantial right or means of protection of his interests to which he may have been entitled under a proper construction of the law—this because, in point of fact, there was a separate trial of that phase of the case which has to do with the distribution of the conjugal partnership property after the question of divorce had been settled by this court and the case was remanded for further proceedings in conformity with the opinion.

But such a contention, it seems to us, and we, therefore, respectfully submit, ought to be given no weight in determining this question of jurisdiction. The question now being considered is not merely whether the husband was placed at any substantial disadvantage by the action of the court below, but a far broader and vastly more important one—one as to the policy of the law itself, and, if there is room for construction, how the law should be construed—in any event how it should be applied.

If, as we believe, it was the intention of the Spanish legislators, as expressed in the articles we have quoted and as indicated in the general policy respecting marriage, divorce and provision for maintenance, that separate suits were to be instituted in such proceedings as that which is now here for review, we do not see how the courts could properly disregard that intention and permit the proceedings to be conducted in accordance with some other rule of practice that is in conflict with the one prescribed in the Civil Code. They could not properly change the law to meet changed conditions caused by the abolishment of the ecclesiastical courts and the bestowing of their jurisdiction

in such cases on the courts established under the American régime.

Any holding in this case to the contrary of this would as it appears to us, have the effect of creating an exception to the rule prescribed, and this the court held in this very case (in disposing of the former appeal) might not be done. "We know of no power in this court," said Mr. Justice Brown in delivering the opinion, "to create exceptions where the statute has made none. Such a decision would be a plain case of judicial legislation."

It will be clear, however, from what follows in Point III and elsewhere in this brief, that the plaintiff in error and appellant in this case was actually deprived of certain rights guaranteed him by law and that he did not in fact have the benefit of a trial of the character intended.

POINT II.

THE SPECIAL JUDGE WHO RENDERED THE DECISION PURPORTING TO BE THAT OF THE COURT OF FIRST INSTANCE OF ILOILO IN THE BRANCH OF THE PROCEEDINGS IN THE CASE AT BAR THAT RELATES TO THE SEPARATION OF THE CONJUGAL PARTNERSHIP PROPERTY, AND WHICH IS NOW HERE FOR REVIEW, WAS NOT PROPERLY DESIGNATED AND EMPOWERED, NOR DID HE AFTERWARDS PROPERLY QUALIFY HIMSELF, TO ACT. HE WAS, THEREFORE, WITHOUT JURISDICTION, AND, AS A CONSEQUENCE, THE SUPREME COURT OF THE ISLANDS HAD NO JURISDICTION, TO AFFIRM THE JUDGMENT BASED ON HIS DECISION. THAT JUDGMENT OUGHT, ON THE CONTRARY, TO HAVE BEEN SET ASIDE AND THE COURT OF

FIRST INSTANCE OF ILOILO OUGHT TO HAVE BEEN ORDERED TO PROCEED IN ACCORDANCE WITH THE MANDATE THERETOFORE ISSUED AND IN CONFORMITY WITH THE LAW RELATING TO SUCH PROCEDURE.

The error alleged in the above heading, counsel for plaintiff in error and appellant respectfully contend, is another of those instances of plain error, manifest on the face of the record, that this court, under its ruling in the case of *Behn, Meyer & Co.* v. *Campbell*, above quoted, may consider though it was not assigned either in the petition for the writ of error or in that for the allowance of an appeal.

As stated more at length in Point III (*infra*), it appears from the record (p. 38) that Judge Norris, the Judge before whom the retrial of the branch of the case relating to the separation of the conjugal partnership property was had (after that branch had been remanded to the Court of First Instance of Iloilo following the settlement of the question of divorce by this court), resigned his office before having announced a decision; that his successor, Judge Ross, believing himself to be disqualified, designated the Judge of another judicial district "to take charge and dispose of" the case, and that that Judge (Judge McCabe) was the one who rendered what purport to be the decision and judgment of the Court of First Instance of Iloilo in this matter.

With respect to substitutions of judges in the Courts of First Instance, the Code of Civil Procedure that was in effect at the time Judge Ross withdrew and designated Judge McCabe to take his place provides as follows (Secs. 378 and 379):

> "Sec. 378. *Special Judge by agreement of parties when Judge disqualified.* If the Judge of a Court of

First Instance should be disqualified as in this Code provided to sit in any action, the parties may, in writing, to be filed with the Clerk, select some member of the bar as a Special Judge and thereupon the Judge shall retire from the bench for the time after directing an entry of the substitution upon the docket, and the Special Judge so selected shall take his place and hear and determine the action, and make all necessary orders, decrees and judgments therein, as if he had been the regular Judge," etc.

"Sec. 379. *Proceedings when Judge disqualified and Special Judge not agreed upon.* Whenever a Judge in a Court of First Instance is disqualified under the provisions of this Code to sit in any action, and the parties do not select a special Judge as provided in the preceding section, the Judge shall immediately notify the Chief Justice of the Supreme Court of his disqualification and of the fact that no Special Judge has been agreed upon, and thereupon the Judges of the Supreme Court shall designate one of their own number, or some other Judge of a Court of First Instance, to hold such a term of court, or such part thereof, as may be necessary, where such action may be pending and to preside at the trial thereof. * * *

"But if the Judges of the Supreme Court shall certify to the Chief Executive that it is inconvenient to assign any other Judge to hold a term, or to try the action, the Chief Executive shall thereupon commission some person learned in the law to attend and hold said court, with the same power as though he had been the regular Judge thereof."

With the exception of Section 380, which provides that "when a Judge of a Court of First Instance is unable from sickness or other physical disability to attend and hold any court at the time and place required by law, temporary provision for a Judge to hold the term of court shall be made as provided in the last two preceding sections" (the ones just quoted), we have found nothing either in the Code or

in the amendatory acts in effect at the time that makes any provision for such substitutions other than the above. Since there was no stipulation of counsel to the effect that Judge McCabe might be substituted and his designation was not made either by the Judges of the Supreme Court of the Islands or by the Chief Executive, therefore, it seems hardly necessary to do more than merely quote the provisions to show that Judge Ross, in appointing Judge McCabe to take his place, acted without authority of law.

If it should be urged in reply that the document referred to in the record (p. 38) "signed by the attorneys for the plaintiff and defendant, agreeing that the case should be decided without waiting for the action of" certain assessors that had been appointed at the trial before Judge Norris, was equivalent to a stipulation of the character above referred to, or an acquiescence, our answer would be that that agreement was entered into more than a year after Judge McCabe was called into the case and had nothing to do with his designation (*id.*); that, in view of the mandatory provisions of the law, counsel could not lawfully, by any subsequent waiver or stipulation or acquiescence, have conferred jurisdiction, *at least to act in behalf of the court*, on a person who had been designated by a disqualified judge, and that, if such inferential waiver, stipulation or acquiescence could be held to have had any effect at all, all that counsel could lawfully have accomplished thereby was to constitute Judge McCabe a sort of arbitrator or referee.

No provision appears to have been made in the Code, and we have found none elsewhere, relating to the enforcement by court proceedings of the awards of arbitrators. There is provision for referees (Secs. 135-140), but it will be observed that the court can order the reference of the case to the referee only after specific consent is given by the parties, and which consent must be filed in writing with the

clerk; that the referee must report his findings to the court; that those findings may be approved or set aside as the court may deem proper, and that the judgment from which appeal may be taken to the Supreme Court of the Islands is, of course, *the judgment of the court itself*, not a report of a referee. There have, therefore, been no subsequent proceedings that could make the judgment that was rendered by Judge McCabe in the case at bar effective as a judgment of the court.

The law being as stated in the above sections of the Code, it seems clear also that Judge McCabe was without jurisdiction to *decide* the case and render judgment, even if he had jurisdiction to sit in it in any event, this because *it was not retired before him* as required by law. The retrial that was had was before Judge Norris, not Judge McCabe, who decided it, and that retrial was three years before the latter's decision (R., p. 38). We shall explain this situation more fully in Point III of this brief. What we desire to point out in this connection is that no provision whatever was made for such a situation as is presented here, either in the Code of Civil Procedure or in any other statute.

In that Code it is manifest that the situation intended to be covered was the ordinary one. When a judge is disqualified, the substitution is to be made before trial and the *trial itself* is to be conducted before the substitute judge. In the circumstances disclosed by the record in this case, therefore, the only way by which Judge McCabe could have acquired jurisdiction to render judgment (if he had jurisdiction by virtue of his designation by Judge Ross to sit in the case at all) was by presiding at an actual trial of the case, by hearing the witnesses testify and by himself ruling on all questions of competency, admission and rejection of evidence, etc. That this is required of Judges of the Courts of First Instance in the Philippines, whether sitting as regu-

lar or special judges, we think will also be clear from what follows in the point just referred to.

POINT III.

THE RETRIAL IN THE COURT OF FIRST INSTANCE OF ILOILO WITH RESPECT TO THE EXISTENCE AND VALUE OF THE CONJUGAL PARTNERSHIP PROPERTY AND THE AMOUNT DIVISIBLE BETWEEN THE PARTIES WAS NOT IN CONFORMITY WITH LAW, IN THAT THE CASE WAS NOT DECIDED BY THE JUDGE WHO PRESIDED AT THE RETRIAL, AND BEFORE WHOM THE WITNESSES APPEARED, BUT BY ANOTHER JUDGE, BEFORE WHOM NOT A SINGLE WITNESS APPEARED, AND WHO WAS SPECIALLY ASSIGNED TO THE CASE WHEN THE TRIAL JUDGE HAD RESIGNED HIS OFFICE WITHOUT HAVING ANNOUNCED A DECISION. FOR THIS REASON (ASSUMING, FOR THE PURPOSES OF ARGUMENT, THAT THE COURTS BELOW HAD JURISDICTION) THE SUPREME COURT OF THE ISLANDS ERRED IN NOT SENDING THE CASE BACK TO THE COURT OF FIRST INSTANCE OF ILOILO FOR PROPER HEARING AND DISPOSITION.

The error alleged in the above heading, counsel for plaintiff in error and appellant respectfully submit, also is one of those instances of plain error which this court, under the ruling in *Behn, Meyer & Co.* v. *Campbell*, quoted above, may consider though it was not assigned either in the petition for the writ of error in the case at bar or in the petition for the allowance of an appeal.

In the opinion accompanying his judgment (*id.*), Judge McCabe explains:

> "The case was then remanded to the Court of First Instance of Iloilo for a further hearing and a new decision upon the value and division of the conjugal partnership property, *and the trial was had and the evidence presented in December, 1907, before the Hon. W. F. Norris, then Judge of that court.* * * * At this trial the plaintiff formally presented in evidence all of the testimony given in the former trial relating to the conjugal property. In addition, much other testimony, oral and written, was presented by both plaintiff and defendant.
>
> "*Judge Norris did not render a decision in this case during the remainder of his service as Judge*, he subsequently resigning. On April 28, 1909, the Hon. James Ross, then Judge of the Court of First Instance of Iloilo, believing himself disqualified to decide the case, made an order, in conformity with law, designating me, Albert E. McCabe, Judge 10th Judicial District, to take charge of and dispose of said case. The last brief and written argument of the attorneys in the case was presented to me July 7, 1910." (His decision is dated December 5, 1910.)

Here is a positive, unequivocal statement by the Judge who decided the case that the new trial ordered by the Supreme Court of the Philippines was had, and that the evidence was presented, before one Judge (Judge Norris) and that the decision was rendered by another (Judge McCabe himself); that the retrial was had in December, 1907; that the case was not referred to Judge McCabe until the 28th of April, 1909, nearly two years and a half after the date of the trial, and that it was not decided by that Judge until December 5, 1910, three years after that date. And there is nothing whatever to the contrary of this anywhere in the record.

The inference is perfectly clear, therefore, that no complete retrial of the case was ever had before the Judge of First Instance who rendered the decision therein, and that, as a consequence, there has never been any new trial either in accordance with or as contemplated in the order of the Supreme Court of the Philippine Islands or in accordance with the law and practice that was in effect in those Islands.

We take it that there can be no doubt that the plaintiff in error and appellant was entitled to a new trial in conformity with that law and practice. It is true that the act of the Congress of the United States (32 Stats., 691) wherein the declaration of rights of citizens of the Philippines is set forth did not become effective as a statute until July 1, 1902, several months after the complaint herein was filed; but it is true also that the guarantees provided in that act had been in effect nearly seven years when the matter of the decision in the new trial of this case was referred to Judge McCabe, and one of those guarantees was that "no law shall be enacted in said Islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws."

And we assume that the principle thus established in the Philippines ought to have been held by the courts below to constitute a protection of the husband from any discrimination in the matter of procedure or practice at the time Judge McCabe took the case under consideration, and this, even though, at the time the suit was begun, the guarantee had not yet been enacted by Congress—or, if not this, that on general principles, since the Islands had some time before the suit was begun become possessions of the United States and were then under the government of a United States Commission, he ought to have been held to be so protected.

For at the time this action was begun, the Philippine Commission had already established the present system of courts and defined their jurisdiction (Act. No. 136, Pub. Laws, U. S. Phil. Comn. vol. I, pp. 289 *et seq.*); and, although there may be no specific definition of it in that new Code, there is every indication that, with respect to trials in the Courts of First Instance, *"due process of law" meant, among other things, a trial wherein the Judge who was to decide the case was present at the giving of the testimony of the witnesses.*

The provisions in that Code for the process of subpoena, for compelling the attendance and testimony of witnesses, those prescribing rules of evidence, those permitting depositions to be taken only when witnesses are out of the jurisdiction, or when they are ill or for some other reason can not appear, the provisions relating to the perpetuation of testimony for future use when a witness is about to leave the country and under certain other circumstances, and the provisions governing the trial of cases, certainly all contemplate the examination of witnesses in open court, at the time of the trial and in the presence of the judge who is to decide the case. And certainly it is contemplated that that particular judge, not some other, is to be the one to pass on questions as to competency, the admission and rejection of testimony, etc.

Otherwise, in a situation like the one now being considered, the deciding judge, instead of acting simply as a trial judge, would have to perform, in some measure, the functions of a court of review—that is, so far as questions arising during the progress of the trial are concerned—and that is a function that is expressly reserved for the Supreme Court of the Islands (Secs. 496 *et seq., id.*, p. 516). The provision as to the trial of cases in the Courts of First Instance, unless for some special reason the judge

shall direct some other order of trial, is (Sec. 132) that "the plaintiff, after stating the issue and his case, must produce the evidence on his part, * * * The defendant shall then state his defense and offer his evidence in support thereof. * * * The parties may then, respectively, offer rebutting evidence," etc.

In Section 273 what is expected of the trial judge is very clearly intimated. "In determining where the preponderance or superior weight of evidence on the issues involved lies," says that section, "the court may consider all the facts and circumstances of the case, *the witnesses' manner of testifying, their intelligence*, their means and opportunity of knowing the facts to which they are testifying, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest or want of interest, and also *their personal credibility*," etc.

To observe the witnesses' manner of testifying, of course the deciding judge would have to be present and he could not very well perform his duty with respect to ascertaining their intelligence, knowledge of the facts and credibility, we should think, unless he were there in court to see them on the stand, unless he were there actually to hear their testimony and to question them himself if the examination and cross-examination conducted by the attorneys should not bring out enough to enable him to form an opinion in such respects.

This view is further supported by the next section of the Code (Section 274), which adds that "*the rules of evidence shall be the same in all courts of the Islands, and upon every trial*, unless otherwise expressly provided by statute," and Section 497 (*id.*, p. 516) provides that "in hearings upon bills of exception in civil actions and special proceedings," even the Supreme Court of the Islands "*shall not review the evidence taken in the court below, nor retry the questions of*

fact, except as in this section hereinafter provided," *i. e.,* "unless the excepting party" shall have "filed in the Court of First Instance a motion for a new trial on the ground that the findings of fact were plainly and manifestly against the weight of the evidence," etc.*

In the United States, in cases that are tried before both judge and jury, the withdrawal of but a single juror at any time before verdict puts an end to the proceeding for the time being and makes necessary a new trial—this at least in jurisdictions in which a unanimous verdict is required and in the absence of stipulation of counsel to the contrary. In equity proceedings, tried in accordance with the usual practice in equity, the effect might not be the same; but such cases are clearly distinguishable. Under that practice the judge is not required to see and hear the witnesses testify, and does not unless he so desires. Usually the testimony is taken out of court by deposition and not in the presence of the judge. The cases are only argued in court. Besides, on appeal, his decisions as to questions of fact are reviewable by the upper courts as well as his decisions as to questions of law. Under the new equity rules established by this court, the federal practice is now to try equity cases also in open court.

In the Philippine Islands, however, no distinction whatever is made between cases at law and in equity so far as the manner of trial is concerned. There is no provision in the declaration of rights, nothing in any act of Congress or of the Philippine Commission, or of the Legislature that succeeded it, which provides for jury trials in actions belonging to either of those branches of jurisprudence. Under the practice provided for in the Code of Civil Procedure

*This provision has since been amended in certain respects, but its effect, so far as this point is concerned, is the same: the appellate court may not review the evidence nor retry questions of fact unless the conditions therein provided for shall have been complied with.

there in effect, all civil cases are tried before the judge alone (except when assessors are appointed, as will be explained hereinafter). In cases both at law and in equity the Judge of First Instance has the decision as to both law and facts and the Supreme Court of the Islands may not review his decisions as to questions of fact unless the appealing party shall have complied with certain prescribed conditions, and even then it can not set such decisions aside unless utterly unwarranted by the evidence.

In all these cases, too, as we think is clear from the provisions of the Code to which we have referred above, the witnesses (except in the instances therein mentioned), must appear and testify in the presence of the judge. Therefore, if, under our practice, the withdrawal of *but a single juror* results in a mistrial, how much more important is it, under such a practice as that which is in effect in the Philippine Islands, that if the *judge himself* should retire before announcing his decision as to the facts and law of the case as a whole—in other words, that if this functionary should withdraw who performs the duties of both judge and jury in all civil cases, whether in the nature of actions at law or not—the parties should have the benefit of a new trial for that reason, a trial in which their rights and interests would be protected by all the safeguards and facilities for reaching a fair conclusion as to the facts that the law provides?

For example, in addition to the means that the law provides for giving the trial judge a practical opportunity to form an opinion of some value respecting the intelligence, knowledge and credibility of the witnesses, it gives the parties themselves (as we have mentioned above) the right to have assessors appointed whose duty it is—

> "To sit with the judge upon the trial of an action and to advise him in the determination of all questions

> of fact involved therein, though the final responsibility must rest with the judge. * * * If the two assessors shall both be of opinion that the findings of fact and judgment in the action are wrong, they shall certify, in writing, their dissent therefrom, and their reasons for such dissent, and sign such certification, which shall be filed with the other papers in the action. In case such dissent is filed, the Supreme Court" (of the Islands) "on appeal, may review the facts upon the evidence adduced in the Court of First Instance and shall give to the dissent aforesaid such weight as, in the opinion of the Judges of the Supreme Court, it is entitled to, and, upon such review, shall render such judgment as they find just." (See Secs. 160 and 161, Code of Cv. Pr.; I Pub. Laws, U. S., Phil. Commn., p. 453.)

At the retrial (or, rather, mistrial) before Judge Norris in December, 1907, assessors were appointed in the case at bar. Says Judge McCabe in the decision (R., p. 38): "In compliance with the Code of Civil Procedure, two assessors were appointed, Messrs. Crescenciano Lozana and Manuel Locsin. * * * Subsequently"—that is, after Judge McCabe's assignment to the case two years and a half after the retrial was had before Judge Norris—"a written agreement was submitted, signed by the attorneys for plaintiff and defendant, agreeing that the case should be decided without waiting for the action of the assessors."

We do not wish to be understood as urging that the failure to compel those assessors to act, or else to order a new trial for that reason, was error for which this court might reverse the court below under th circumstances—we could not very well so contend in view of the fact that the report of the assessors appears to have been waived—but it does seem proper to bring to the attention of the court such a situation merely as an instance of a very im-

portant right of which one or both of the parties might be deprived under like conditions in any civil action if a practice like the one in question were permitted, for it was obviously the great delay that had occurred, at least partly, through the failure of Judge Norris to compel those assessors to act or else order a new trial, that induced the attorneys to stipulate that Judge McCabe might dispense with their advice.

POINT IV.

THE COURTS BELOW ERRED IN ATTEMPTING TO LIQUIDATE THE CLAIM OF THE WIFE TO A SHARE IN THE CONJUGAL PARTNERSHIP PROPERTY AS OF JULY 5, 1902, THE DATE OF THE JUDGMENT OF DIVORCE. THE JUDGMENT WITH REFERENCE TO THE WIFE'S CLAIM TO SUCH SHARE WAS A MERE MONEY JUDGMENT. THERE SHOULD HAVE BEEN AN ORDER OR DECREE OF SEPARATION OF THE PROPERTY IN QUESTION AS REQUIRED BY LAW, AND THE LIQUIDATION SHOULD HAVE BEEN MADE AS OF THE DATE OF THAT ORDER OR DECREE. IN THE ABSENCE THEREOF, NEITHER THE COURT OF FIRST INSTANCE OF ILOILO NOR THE SUPREME COURT OF THE ISLANDS HAD JURISDICTION TO RENDER ANY JUDGMENT WHATEVER IN THIS BRANCH OF THE CASE.

Article 1433 of the Civil Code (*i. e.*, the one that contains the substantive law and the provisions prescribing the practice in cases of this character, and was in effect at the time this action was begun) provides that "in the absence of specific declaration in the marriage contract, the separa-

tion of the property of the spouses during the marriage shall not take place *except by virtue of a judicial decree.*" According to the War Department's translation, Article 1434 reads: "After the separation of the property has been ordered, the conjugal partnership shall be dissolved and its liquidation shall be made according to the provisions of this Code."

This translation we do not believe to be quite accurate. The original in Spanish reads: *Acordada la separación de bienes, quedara disuelta la sociedad de gananciales y se hara su liquidación conforme a lo estableciado por este Codigo.*" A literal translation is: "Accorded the separation of goods, shall stand dissolved the partnership of earnings and shall be made its liquidation conformably with that which is established by this Code." We think, therefore, that the War Department's translation should read: "When the separation of the property shall have been ordered, the partnership in the conjugal earnings shall stand dissolved and its liquidation shall be made in accordance with the provisions of this Code."

However, in view of the provision of Article 1433 above quoted and the other provisions of that Article making it optional in the wife whether to petition for a separation of the conjugal partnership property or not, and in view even of the War Department's version of Article 1434, it is perfectly apparent that it was the purpose to require such a petition and order or decree as a prerequisite to liquidation and distribution; that the purpose of requiring such an order or decree is to have the court fix a date, other than the date of the divorce, as of which the liquidation shall be made, and that, in the absence of such petition and order or decree, the courts are without jurisdiction to give judgment for any amount whatever in favor of the wife on account of any claim she may have to a share in the conjugal partnership property.

As said by Dr. Manresa in the commentary on Article 1433 that we have quoted hereinbefore, "the decree of divorce" does not produce "*by itself alone* the separation of the property of the marriage. The law heeds above all the *volition* of the innocent or present spouse and concedes to them that right in order that, at their arbitrary will, they may or may not make use of it, that they may petition or refrain from petitioning. * * * The will of the present or innocent spouse is, then, by itself alone ineffective. The will or decisions of the tribunals, by themselves alone, are also ineffective, notwithstanding the gravity of the facts or causes that may constitute the reason for the separation" (of the property). "The party in interest must ask for it and the tribunal must grant it * * * always when in compliance with the legal prescription."

And with respect to Article 1434 the Commentator says in the same volume (the IXth) at page 773:

> "When the separation of the property shall have been decreed, the conjugal partnership stands dissolved and its liquidation shall be made in accordance with the provisions of the Code. * * * Article 1434 specifies the general effects of the separation of the property, whatever may be the cause that brings it about and whether the proceeding be by the husband or the wife. * * * The first and principal effect of *the separation of the property*" (not the divorce), "*once it be decreed*, is the dissolution of the conjugal partnership in conformity with what has already been provided in Article 1417."

At page 687 he says:

> "*The value of the property should be that which it in fact has on the day of the dissolution of the partnership* * * * but from the day of dissolution until the day of liquidation there may exist differences in

> value that may be of vital interest to the parties to the dissolved partnership. The conjugal partnership no longer exists, but there are co-owners just as there are co-heirs in a succession. If the inventory be promptly made and the liquidation is delayed before the latter is carried into effect, the charges found in the inventory with respect to the interests of the two parties in the divisible assets are to be shown. For instance, animals constituting part of the property may die or increase in number, mining stock may become enhanced or diminish in value, etc."

And Dr. Ruiz, in Volume IX, at pages 184 and 208 of his work (*supra*), says to the same effect:

> "After the dissolution of the conjugal partnership for any of the causes specified in Article 1417" (*i. e.*, by death or nullification of the marriage, or when the separation is granted because of civil interdiction, absence or divorce), "its liquidation becomes necessary in order to deliver to the spouses or their heirs their respective properties, to pay the debts of the partnership, to determine the profits and to divide them if there are any. * * * The liquidation comprises three parts or periods: the inventory, the separation of the capitals and payment of the debts, charges and obligations of the partnership, and the adjudication and division of the profits. * * * *Once the separation is decreed*, to accomplish which it is sufficient to present the final judgment that may be rendered against the absent or guilty spouse, *it produces, as in the case of death or nullification, the effect of dissolving the conjugal partnership and its consequent liquidation*, for which Article 1434 and the provisions of the preceding Article provide."

In the case at bar, as has been already pointed out, no petition has ever been submitted to the court of the character referred to; no facts have ever been alleged such as are

necessary under these provisions to give the court jurisdiction to act with respect to the separation of the conjugal partnership property; no such facts could possibly have been alleged at the time the petition submitted in this case was filed because the divorce had not yet been granted and the facts had, therefore, not yet come into existence, and, even when the divorce was granted and the case was remanded to the Court of First Instance for further proceedings with reference to this branch of the case (following the disposal of the appeal to this court), the petition was not ever amended by the insertion of a recital of the granting of the divorce.

And, apart from all this, *there has never been any order or decree in the case authorizing the separation of the conjugal partnership property, or its liquidation or distribution.* The judgment of Judge Odlin, following the first trial in the Court of First Instance, was only that "the defendant, Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum of $81,042.76, Mexican money, due her as her unpaid share of the property belonging to the conjugal partnership heretofore existing between them and dissolved by virtue of this decree" (R., p. 21). It is evident that the impression of the court was that the divorce granted in the preceding paragraph dissolved the conjugal partnership, not that any decree of separation was necessary and that the liquidation must be made as of the date of that decree.

That judgment, however, was reversed by the Supreme Court of the Islands because it was thought that there was error in arriving at the amount and the question was sent back to the Court of First Instance for reconsideration. The judgment rendered by Judge McCabe after the retrial (R., p. 49) was simply that "the defendant, Esteban de la Rama, pay to the plaintiff, Agueda Benedicto de la Rama, the sum

of P. 58,543.37, with legal interest at the rate of 6 per cent per annum from July 5, 1902" (the date of the judgment of divorce, which remained in effect) "to the date of payment of this judgment." Here there was not only no order of separation, but not even so much as an allusion, as in the judgment of Judge Odlin, to any dissolution of the conjugal partnership.

And this is the judgment that is now here for review (for it was affirmed by the Supreme Court of the Islands)—a mere money judgment, based not on any order or decree of separation of the property, which, as we have seen, is a prerequisite and, therefore, essential in such cases, but on a liquidation, and, as we shall presently show, a liquidation erroneous both in manner and form, that was attempted as of the date of the divorce—a judgment in arriving at which every single step prescribed by the two Codes in effect at the time (the Spanish Civil Code and the American Commission's Code of Civil Procedure) was utterly ignored.

Judge McCabe was not even properly designated to sit in the case; he did not even hear and determine it in accordance with law; for the reasons just stated, his judgment was one that he had no jurisdiction to render, and, as will presently be shown, the amount for which he gave judgment was arrived at as a result of utterly erroneous conclusions.

POINT V.

THE SUPREME COURT OF THE ISLANDS (AGAIN ASSUMING, FOR THE PURPOSES OF ARGUMENT, THAT IT HAD JURISDICTION) ERRED IN NOT REVERSING THE COURT OF FIRST INSTANCE OF ILOILO BECAUSE OF

THE FAILURE OF THAT COURT TO MAKE UP, OR CAUSE TO BE MADE UP, AN INVENTORY OF THE SORT REQUIRED BY THE PROVISIONS OF LAW UNDER WHICH THESE PROCEEDINGS WERE INSTITUTED; ALSO IN SUSTAINING THE HOLDING OF THAT COURT TO THE EFFECT THAT AN ALLEGED SHARE IN THE SUPPOSED PROFITS OF A FIRM TO WHICH APPELLANT BELONGED WAS PROPERTY IN HIS POSSESSION, THOUGH THERE WAS NO PROOF OF THE EXISTENCE OF SUCH PROFITS AT THE TIME OF THE TRIAL OR OF THE RENDITION OF THE JUDGMENT; ALSO IN AFFIRMING THAT PART OF THE JUDGMENT OF THE COURT OF FIRST INSTANCE WHICH INCLUDES IN THE AWARD TO THE WIFE AN AMOUNT ARRIVED AT BY AN ATTEMPT TO COMPUTE PROFITS OF SAID FIRM BASED ON MERE CONJECTURE.

This case has been brought here by both writ of error and appeal. Counsel for plaintiff in error and appellant assume, of course, that one or the other will be dismissed and think it likely that it will be the writ of error, this not only because it was by virtue of an appeal that the former question herein was determined by this court, but because, since the part of the proceeding that is now at bar was in effect instituted for the purpose of obtaining a decree of dissolution of a partnership, and an accounting, liquidation and division of partnership assets, we take it to be in the nature of a proceeding in equity, and, as a consequence, under the ruling in *Behn, Meyer & Co.* v. *Campbell* (*supra*), reviewable on appeal.

If so, disputed questions of fact might be considered by the court, as they were on the former appeal; but it will not be necessary, as it seems to us, for the court at this time to consider any such *questions* of fact or any facts other than those found by the trial court to have been established, because it was on those facts alone that the Supreme Court below based its judgment and the testimony and other evidence that was submitted in the case has been omitted from the record. For the purpose, therefore, of obtaining the court's consideration of what is now about to be presented, it would seem to make no difference which of the methods of bringing the case here for review is the proper one. In either event the court is not required, under the present circumstances, to deal with anything more than the questions of law resulting from conclusions based on what the trial court found the facts to be.

The Facts as Found by the Court.

It is admitted in the answer that the husband and wife in this case were married in Vallodolid, Island of Occidental Negros, on the 9th of July, 1891 (R., p. 4). Judge McCabe found as facts that they lived together about thirteen months, or until August, 1892, when they separated at the behest of the husband and without conformity thereto on the part of the wife (*id.*, p. 38); that, at the time of the marriage the wife possessed no dowry and neither the husband nor the wife had any property (*id.*); that when the husband and wife separated the wife went to live with her mother in Vallodolid; that she continued to live with her until the judgment of divorce, July 5, 1902 (*id.*), and that after the separation the wife received from her husband no "aid or support" (*id.*).

Judge McCabe further found that Isidro de la Rama, the father of the husband, died some time in 1897, having bequeathed or devised to each of his three sons and his daughter an equal, undivided one-fourth interest in an estate valued at P. 1,058,192 (*id.*, p. 39); that in September, 1897, the four heirs (one of whom was Esteban de la Rama, the husband in this case) organized a firm known as Hijos de I. de la Rama, to engage in a general commercial business, with headquarters in Iloilo, and that, for use as firm capital, each of the heirs contributed the whole of his or her fourth part of the "money, effects and other properties" left by the deceased (*id.*); that, by the terms of the articles of partnership the death of one of the partners was not to bring about a dissolution of the firm, but that his or her rights should be assumed by the heirs (*id.*), and that the members of the firm were to permit their respective shares of the profits (with the exception of certain small amounts that will be mentioned presently) to remain in the business for use as additional capital of the firm (*id.*).

It was further found that under the articles of partnership there was to be set aside as a "reserve fund," and deposited with an "establishment of credit" in order that it might earn interest, twenty per cent of the net profits of the firm (*id.*); that each of the partners living in the Philippines should have the right to draw for private expenses P. 200 a month; that those living elsewhere should have the right to draw not to exceed P. 600 a month; that the compensation of the person who should act as manager of the firm's affairs was to be at the rate of P. 450 a month, and, in addition, he was to be entitled to a compensation of five per cent of the "total profits" (*id.*); that the husband in this

case, Esteban de la Rama, became manager in February, 1899, and that he continued to serve in that capacity up to the time of the trial (*id.*).

Judge McCabe further found that on the 11th of January, 1902, one of the four members of the firm died intestate and without issue and that the other three inherited his fourth interest; that, from the date last mentioned the husband herein was, therefore, the owner of a *third* interest in the firm's business and property, and that those interests of his (*i. e.*, for some years his one-fourth and after January 10, 1902, his one-third) constituted the only capital he had brought into the conjugal property partnership here in question (*id.*, pp. 39, 40). As to the wife, Judge McCabe found that, in February, 1899, she received, through the death of her father, P. 2,000 (*id.*, p. 38), and that on the 5th of July, 1902 (the date of the judgment of divorce, as of which Judge McCabe held that the conjugal partnership accounting must be had), she was not possessed of any "money, interests or other property" belonging to said conjugal property partnership (*id.*, p. 49).

Thinking that it might possibly enable the court more easily to form a clearer idea of the questions involved, we have shortened somewhat and rearranged the tabulated statements that were prepared by Judge McCabe and set forth in his decision (R., p. 41 *et seq.*) and we here insert the rearrangement referred to. In it, however (except in instances in which it is obvious that mistakes occurred in the additions and subtractions made by the Judge), we have used the same figures that were made use of by him.

The Wife's Claim.

According to her contention as understood by Judge McCabe the wife claimed half of—

Her husband's ¼ of the earnings of the firm of Hijos de I. de la Rama	P. 138,480.00	
5% of such earnings due her husband as manager for the year 1899-1900	6,972.69	
Same for the year 1900-1901	9,763.73	
Same for the year 1901-1902	22,365.61	
Her husband's withdrawals, at P. 200 a month, as member of the firm from October, 1897, to July, 1902	11,400.00	
Her husband's salary as manager of the firm, at P. 450 per month, from February, 1899, to July, 1902	12,600.00	
Total		P. 201,582.03
Deduct debts of wife		2,000.00
Total value of conjugal partnership property		P. 199,582.03
Value of the half claimed by the wife		P. 99,791.02

The Husband's Claim.

The husband stated his account with the wife to be as follows:

His assets:

Capital of firm of Hijos de I. de la Rama at the time of the death of his brother, January 11, 1902, according to inventory prepared as a result	P. 1,294,828.33	
Original capital of said firm	1,058,192.00	
Difference consisting of profit		P. 236,636.33
Capital of said firm January 11, 1902, as above	1,294,828.33	
Capital of the firm July 5, 1902, at date of decree of divorce	1,269,888.10	
Difference consisting of loss		24,940.23
Total profits from beginning of business of said firm to date of decree of divorce		211,696.10
Husband's ¼ of profits (P. 236,636.33) to date of death of his brother, January 11, 1902	59,159.08	
His ¼ share in losses (P. 24,940.23) from January 11, 1902, to date of decree of divorce, July 5, 1902	8,313.41	
His total interests in the profits of said firm from the beginning to the date of the decree of divorce		P. 50,845.67

It will be seen from the above that the husband admitted having property belonging to the conjugal partnership to the value of P. 50,845.67, but, by way of set-off, he claimed that the wife had conjugal partnership property which consisted of P. 45,567, earned by her during the period since the marriage and P. 2,000 received from her father's estate, making P. 47,567 in all. This, he claimed, added to his P. 50,845.67, made the total value of the conjugal partnership property P.98,412.67; the wife's half, he said, would be P. 49,206.33, and he claimed that, deducting the P. 47,567 already had by her and never turned over to him as manager of the partnership affairs, the balance that would remain due by him to her would be but P. 1,639.33. (Judge McCabe makes this last amount P. 739.28, but this is obviously due to mistakes in figuring.)

It will be seen from the following that the court allowed neither of the above claims, and that the only figure that was accepted was that given by the husband as the profit of Hijos de la Rama to January 11, 1902.

The Account as Stated by Judge McCabe.

The husband's ¼ share of the gains of Hijos de I. de la Rama to January 11, 1902, according to inventory made up at death of the husband's brother	P. 59,159.08	
Husband's ¼ interest in reserve fund to January 11, 1902	16,065.24	
Husband's ⅓ share of profits of said firm from January 11, 1902, to July 5, 1902, the date of the decree of divorce	26,666.66	
Old balance due husband by said firm on July 5, 1902, as shown by the firm's books	6,695.77	
Five per cent of profits of said firm due husband for year ended June 30, 1902	8,000.00	
Value of house in Molo belonging to husband.	500.00	
Total value of conjugal partnership property.		P. 117,086.75
The wife's half		P. 58,543.37

The Questions of Law.

In explaining the processes by which he arrived at this computation, Judge McCabe says in part, in the decision, that two inventories were submitted by the husband: the one above mentioned and another intended to bring the husband's account with the firm of Hijos de I. de la Rama down from January 11, 1902, the date of the death of the brother, to July 5, 1902, the date of the decree of divorce. Of the inventory of January 11th Judge McCabe says (R., p. 47): "This court feels that considerable weight should be given to the statements" there made.

"This inventory was originally made because one of the partners had died," he continues, "and not for presentation in this cause. There was no reason why the surviving partners should not desire all the property to be included and the true valuation of the property given. They were the beneficiaries of the deceased partner's interest. Therefore, the court so accepts it." Yet he says in another place (*id.*, p. 43) that "there has been no annual closing of the books and declaration of profits prior to 'June 30, 1900,' and there had been heavy losses in the capital owing to the fire and bombardment of Iloilo and other causes."

Of the other inventory, known as "Document I" in the case, he says (*id.*, p. 46): "It is the opinion of this court that it can not accept Document I as a true and accurate statement and inventory of the property and financial condition of the firm of Hijos de I. de la Rama and of the defendant on July 5, 1902. It appears to be but a partial, incomplete statement and is contradicted in a number of particulars by other evidence presented in this cause."

He then proceeds to point out certain discrepancies—for the most part very small ones — between the amounts given in the items of the inventory and the statements made on the witness stand by one Fortunato Fuentes, the bookkeeper of the firm. "According to the testimony of Fuentes," he adds, "no inventory or any liquidation was made by the firm at the end of the fiscal year June 30, 1902, or July 5, 1902. Those items referred to in Document 1 were a partial liquidation, ordered by Esteban de la Rama to ascertain his status."

Now, what sort of an inventory is it that the Code requires to be made up and by whom is it required to be made up? Of this Judge McCabe says in his opinion (R., p. 44)—

> "It is the meaning of the Civil Code that this inventory shall be made and presented by the spouse having control and possession of the conjugal partnership property unless some other method is provided by law (as in the case of the death of that party), or by order of the court, or by agreement between the parties. It is not our opinion, however, that the other party or the court is necessarily bound to accept as correct that inventory, in part or in whole, if other competent proof is before the court showing its inaccuracy. * * * And the court, in deciding the amount and value of the conjugal property, should do so after considering the inventory and all other evidence presented before it, and, if there is proof showing the facts to be different from that given in the inventory, then it is the duty of the court to find according to that proof, even though it is in direct contradiction of some of the statements in the inventory."

It is respectfully submitted that this displays an utter misconception of the law. Doubtless it is true that the

court, in deciding as to the amount and value of the conjugal partnership property, should consider the evidence; but it is not provided in the Code that any inventory shall be submitted by the spouse having control and possession of the property, nor, as it seems to us, was any such thing intended. On the contrary, it seems perfectly clear from what we have quoted that the theory is that *the inventory shall be made up by the court*, or under its direction. All that the Code provides—aside from the indications as to what that inventory shall contain—is that "upon the dissolution of the partnership, an inventory shall immediately be made" (Sec. 1418).

As Dr. Manresa says in his Commentaries (*supra*), "the partnership has ceased to exist. The interests of the partners and of third persons, and the private capital and common capital, are for the time in a state of confusion and mixture. There is necessarily a transitory and abnormal period until the liquidation can be effected, until the property belonging to each can be separated and turned over and it can be ascertained whether or not any partnership assets exist. * * * 'Under the denomination of liquidation of partnership property,' says Sanchez Roman, 'are comprised all the operations necessary to determine whether or not partnership property exists and its distribution, half and half, between the two spouses, after deductions and restitution to each of them of such property as belongs to each particularly.'" And it will be remembered that Dr. Manresa says of the inventory so to be prepared that:

> "It is the basis of the liquidation of the partnership property. * * * *The inventory is of extraordi-*

> *nary importance and requires consummate care and a close examination of the whole life of the partnership*, for it does not treat of a simple relation of property or effects, but must contain in items the various amounts that the law considers to be collectable and as having any bearing upon the result of the liquidation. * * * The inventory is a faithful and exact statement of all the property that exists belonging to either of the spouses, or to both, at the termination of the partnership and of all the credits to which the partnership is entitled."

In Sections 1373, 1378 and others, and in Sections 1421 and 1426 of the Code, inclusive, not only what the inventory shall contain, but the order in which the items shall be inserted, is indicated. First come the dowry and paraphernal property of the wife and the marriage gifts bestowed on her by her husband, if any. All these must be ascertained and stated because, before any other deductions can be made, they must be set apart to be returned to her. Next come the "debts, charges and obligations" of the partnership, and, of course, the credits. After these come the capital of the husband and the marriage gifts bestowed on him by the wife, if any, for they, or their value, must be returned to him, after all the other deductions shall have been made, if anything remains out of which to return them, and after these come the losses or deterioration that the property belonging to either the husband or wife may have sustained. It is only the "net remainder" that is to be divided between the parties, share and share alike (Sec. 1426). Therefore, that net remainder must also be ascertained.

An inventory of the character of the one the court accepted in this case—accepted in spite of the fact that it was not an inventory of the conjugal partnership property as

such but of a commercial firm of which the husband was a member, and notwithstanding the testimony of the bookkeeper that "there had been no annual closing of the books and declaration of the profits" prior to June 30, 1900—is certainly, it seems to us, not the kind of inventory that is contemplated by law. Naturally the court, in making up such an inventory as *is* contemplated, or in causing such an inventory to be made up, would have to rely on such evidence as could be obtained. Nevertheless, it is obviously the court's duty, by every means in its power, to compel the production of all the evidence obtainable and to see to it that the inventory made up shall be of the sort that is required, or as nearly of that sort as it is possible, under the circumstances, to make it, just as it is the court's duty in this country, on citation of a husband for contempt when he disobeys an order to pay alimony, to compel him to make a disclosure of his means.

The lengths to which the failure to do this forced Judge McCabe to go in his efforts to arrive at some conclusion in this particular case supply probably as good an illustration of the correctness of the construction for which we contend as could be presented. For example, the second item mentioned in his computation of the value of the conjugal partnership property (R., p. 48) is stated to be the husband's one-fourth interest in the "reserve fund" of the firm. Of this Judge McCabe says (R., p. 46): "There appeared to be in existence January 11, 1902, P. 64,260.97 of the 20 per cent reserve fund. * * * According to that inventory" (the one of that date), "the net gain up to January 11, 1902, and which formed an addition to the capital of the firm, was P. 236,636.33, and of which P. 59,159.09, or one-fourth, was defendant's share, to which should be added his one-fourth of the reserve fund of P. 64,260.97 or P. 16,065.24."

Why this should be included in the property that the husband held in common with his wife he does not say. True, by the terms of the husband's articles of partnership with the other members of his firm, a reserve was to be established. Reserves, however, do not always constitute assets, at least within the ordinary meaning of the word. If created merely for the purpose of providing a fund to meet future contingencies, they may perhaps retain that character until actually appropriated to the purpose; but they may also be created in the form of sinking funds, destined at the time of their creation to the retirement of bonded indebtedness already existing, or to recoup some loss already sustained, or to cover depreciation of plant or equipment, or to meet some existing liability other than a bonded one, or else a liability certain to come into existence.

In that event, if such were the purpose of the reserve that was created in the case at bar, the husband in this case could not properly be chargeable as conjugal partner with a share in it because of his membership in the firm of Hijos de la Rama, for it would constitute a debt or liability attributable to the operation, not alone of the firm property, but of *the conjugal partnership property*, which was being employed in the operations of the firm, and, therefore, would be subject to deduction under the provisions of the Code. Evidently the inventory did not disclose whether, in its essence, this reserve was an asset or not, but certainly a detailed inquiry and proper evidence would have developed what was the actual fact in that regard.

Another example is supplied by the next item in Judge McCabe's computation, which embraces what he states to be the husband's one-third share of the profits of the firm from January 11, 1902, to July 5, 1902, P. 26,666.66 in amount. This is confessedly *mere estimate*, based on testimony by the bookkeeper Fuentes to the effect that for the

two years prior to June 30, 1901, the operations of the firm had produced a profit of P. 320,000, or an average of P. 160,000 each year; that no balance had been struck for the year ended June 30, 1902, but that that year might produce the same ratio of profit. "From January 11, 1902, to July 5, 1902, is approximately six months," explains Judge McCabe, "and therefore, P. 80,000 should be added to the amount given in the inventory of January 11, 1902, as the profits to July 5, 1902. Of this P. 26,666.66, or one-third, would be the defendant's share" (R., p. 47).

How could it be possible for Fuentes or Judge McCabe to have known what the profits would be for that year, especially in view of the fact that at times in the history of the firm there had been severe losses (R., pp. 43, 46)? On the other hand, as in the case of the reserve fund, just whether or not there was *in fact* any such profit during the period of six months referred to, and how much profit there was, if any, could have been ascertained by an examination of the books.

Still another item embraced in the court's computation is one of P. 8,000, stated to be the husband's five per cent of the profits of the firm for the year ended June 30, 1902. Judge McCabe disallowed two similar items contained in the wife's statement of her claim because he conceived the demand as a whole to be one for the "gross amounts of the profits, salaries, earnings and perquisites, *allowing nothing for loss, living or other necessary expenses, or for money spent or property disposed of.*" This he said was a demand that he found himself unable to approve. "It is not our understanding," he explained, "that this is the proper method of arriving at what is the conjugal property to be divided at the marriage dissolution. In the opinion of this court, it must be property in existence at the time of the dissolution of the marriage and in the control or custody

of one or both of the conjugal partners," etc. (R., pp. 43, 44). If, however, the five per cent claimed by the wife for the two years from 1899 to 1901 could not properly be allowed, on what theory would it be proper to allow the five per cent for the year ended June 30, 1902, included in the computation referred to? As to this Judge McCabe does not enlighten us.

No computation based on any such methods of accounting and views of the law as are disclosed in the decision in question is sufficient, we confidently urge, to support the judgment that was rendered against the husband in this case. It is clear that no proper effort was made to comply with the provisions of the Code under which the action was instituted, either with those relating to the inventory or with those defining the status and rights of the parties in the matter, and that, in the failure to apply the appropriate principles to the facts and conditions as found, the Supreme Court below erred in not reversing the Court of First Instance.

To hold otherwise would be to permit a practice under which it would be possible in many cases to defeat the perfectly obvious purpose of the law, for, unless the court shall in every case take it on itself to see to it that the fullest practicable disclosure is made, all sorts of fraud, concealments and trickery could be resorted to by the spouse who has the management of the conjugal property.

POINT VI.

THE COURT BELOW ERRED IN AFFIRMING THAT PART OF THE JUDGMENT OF THE COURT OF FIRST INSTANCE OF ILOILO RENDERED IN 1910 WHICH ALLOWS INTEREST ON THE AMOUNT STATED THEREIN FROM JULY 5, 1902.

As a result of the retrial of the case by virtue of the mandate of the court below, Judge McCabe inserted in the judgment rendered by him in 1910 a requirement that plaintiff in error and appellant pay "legal interest at the rate of six per cent per annum from July 5, 1902" (the date of the judgment of divorce), "to date of payment of this judgment."

In other words, although the amount of Judge Odlin's judgment of 1902 was reduced, as a result of Judge McCabe's consideration of the matter on rehearing, from P. 81,042.76 to P. 58,543.37, Judge McCabe added an amount by way of interest for the period between the dates of the two judgments (*i. e.*, between July 5, 1902, and December 5, 1910), that increased the latter judgment to the extent of nearly fifty per cent and made the total greater than the amount awarded in the judgment that was reversed; and, as an appeal was taken first to the Supreme Court of the Islands from the judgment of Judge McCabe and in turn from that court to this, it is apparent that, unless this holding of Judge McCabe shall be reversed by this court, *the plaintiff in error and appellant will have incurred a penalty of nearly ninety per cent for having successfully obtained a reversal of the judgment of July 5, 1902.*

Such an award of interest is most unusual. We do not believe that ever before in the history of this court has it been called upon to consider a burden so onerous and unjust; and, under the circumstances of this case, it can not but constitute other than the clearest sort of error. As just intimated, interest on a judgment in the ordinary case is in the nature of a *penalty*, imposed as much for the purpose of inducing prompt payment as for the purpose of compensating the successful litigant for any unwarranted delay in receiving his money. In no case, therefore, is interest on a judgment or decree *allowable as a matter of*

course. On the contrary, it is dependent primarily upon a consideration of whatever statutory authority may exist for such allowance in each particular kind of case, and upon the circumstances calling for its exercise.

Here the Civil Code that was in effect in the Islands at the time this suit was begun makes no provision for interest on the amount found due as the innocent spouse's share of the value of the conjual partnership property; the complaint in the case at bar contains no prayer for such allowance, and the judgment entered by the Court of First Instance of Iloilo after the first trial bore no interest (R., p. 21).

It is respectfully submitted that since the Civil Code that was in effect in the Islands at the time the action was begun made no provision for interest, Judge McCabe erred in allowing any interest whatever and the Supreme Court below erred in affirming such allowance. On the familiar principle that the expression of one thing excludes all others, we regard this as self-evident, for the Code does provide just exactly what shall be comprehended in the liquidation—just what shall be deducted from the community property and exactly what shall be divided between the parties. The absence of any provision for the allowance of interest, therefore, ought, it seems to us, to have been held to exclude such an item from consideration altogether.

And, in this connection, it is significant that in a similar case that was recently appealed from the District Court of the United States for Porto Rico, where the community system is also in effect, no interest was allowed. The case to which we refer is that of *Garrozi* v. *Dastas* (204 U. S., 64). There had been a suit by a husband against his wife for divorce, the wife had filed a cross bill, the court had allowed her alimony *pendente lite* and she had incurred certain expenses in the matter of her defense, which the court held

that she was entitled to recover. The husband had evaded payment on the ground that he was insolvent and she had filed a petition alleging that the insolvency was only pretended and praying that certain transactions be set aside, and, after the divorce had been granted, she had amended her petition by reciting the decree and praying for a liquidation of the conjugal partnership property and an award of her share. Although this court sustained her right to such award, it does not appear that interest was even claimed, yet the wife's suit was begun in 1891 and the case was not finally decided until January, 1907.

And we think that on general principles also such an allowance could not properly be made. Those principles are well defined. When a judgment or decree appealed from is affirmed by an appellate court, interest is usually allowed from the date of the judgment or decree so affirmed. Also, when a judgment or decree is appealed from and the appellate court holds it to be correct in part but improper insofar as it includes particular items, interest is usually allowed on the amount awarded in the judgment or decree as so modified. That is to say, if the appellate court merely holds certain specified items to have been improperly allowed, and the balance is approved, that balance may bear interest from the date of the rendition of the original judgment or decree.

But when, in a case like the one at bar, the appellate court concludes that the decision of the trial court should be reversed and set aside *as a whole*, because based on some erroneous principle or theory, and when for that reason a new trial is ordered, which, when had, results in an entirely different award, it is not within the power of the court to allow interest on the second award from the date of the first, since by the reversal the first is rendered utterly nugatory. The distinction is obvious, it seems to us, and has more than once been brought to the attention of, and recognized by, this court.

Thus the case of *Kneeland* v. *American Loan & Trust Co.* (138 U. S., 509), was one in which a railroad had been in charge of receivers for a certain period, during part of which the receivership was at the instance of a judgment creditor and during part of which it was at the instance of bondholders. Certain persons had made claim on account of rentals of equipment during the whole period of the receivership and those claims had been sustained by the Circuit Court. On appeal to this court it had been determined that the principles on which the rentals were calculated by the Circuit Court were correct but that the allowances themselves were improper except for the period during which the road was under receivership at the instance of the bondholders.

In its second decree the Circuit Court observed the same principles of calculation but so reduced the amounts of the respective claims that they embraced the shorter period and awarded interest on the reduced amounts from the date of the first decree. The propriety of that allowance was one of the principal questions before this court on the second appeal (138 U. S., 509). The allowance itself was, of course, sustained, but the principle involved was thus indicated in the opinion:

> "All the court had to do was to deduct from the amount allowed to each intervener one-third of the amount for the year ending August 1, 1884. In each of these reports as well as the decrees the rentals due from August 1, 1884, to January 1, 1885, had been stated; and, on receiving our mandates, the Circuit Court interpreted them as in effect affirming so much of the decree as allowed these amounts to the interveners and its new decree awarded interest thereon from the date of the former decrees.
>
> "We think the ruling of the Circuit Court was correct. The amount of the allowances for these five

> months was separately stated and such allowances were sustained by this court. While the former decrees were in terms reversed and the cases remanded for the entering of new decrees, yet the terms of those new decrees were specifically stated and insofar as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance."

The case of the *Illinois Central Railroad Co.* v. *Turrill* (110 U. S., 301) is one from which the principle may be still more strongly implied. In that case the trial court had held the plaintiff entitled to damages for loss of profits resulting from the infringement of certain patent rights. With respect thereto the amounts of the losses were calculated separately. On appeal to this court it was held that there had been infringement of some and not of others. The case was thereupon sent back to the trial court, but only for the purpose of having that court ascertain the proper deductions to be made from the amounts first awarded. On the second appeal this court said:

> "If the decrees had been entered originally for the present amounts, the patentees would have been entitled to interest from 1874. * * * Under these circumstances it seems to us not at all inequitable to allow interest on the corrected amounts from the date of the master's report in 1879. *The cases are altogether different in this particular from what they would have been if the original decree had been reversed for errors in the principles of the accounting.* Those decrees may very properly be considered as affirmed in part and reversed in part."

In the case at bar the reversal of the judgment of July 5, 1902, from the date of which interest is allowed by the second judgment (of December 5, 1910), was emphatically "for errors in the principles of the accounting"; it had to do

with the whole theory on which that judgment of July 5, 1902, was based and on which the amount therein awarded was calculated. "An examination of the decision of the Court of First Instance," said the Supreme Court of the Islands (R., p. 55), "shows that no attempt was made to comply with any of these statutory provisions. * * * The court below rejected entirely the method prescribed by the Civil Code for the liquidation of this partnership and in fact liquidated it, as appears from the decision, upon an entirely different basis;" and then, after pointing out some of the respects wherein the trial judge disregarded the provisions of the law, the upper court went on to say:

> "It needs no argument to show that this manner of liquidating the affairs of the conjugal partnership is unwarranted by the law. The theory of the Civil Code is that the conjugal property is the actual property that is left at the dissolution of the partnership. It can, therefore, never be determined by adding up the profits, which had been made each year during its existence and saying that the result is the conjugal property. *The difference between the two systems is well illustrated in this case.* * * * The result is that that part of the judgment * * * ordering the payment by the defendant to the plaintiff of 81,042.76 pesos, Mexican currency, is set aside and the case is remanded to the court below for the purpose of liquidating in this action the affairs of the conjugal partnership (considering the same to have been dissolved on the 5th of July, 1902) in accordance with the rules laid down in the Civil Code."

In fixing July 5, 1902, the date of the divorce, as the date as of which the liquidation was to be made, the Supreme Court of the Islands itself erred, as we think we have sufficiently demonstrated hereinbefore, but there can be no question as to the reversal of the award of 81,042.76 pesos

as a whole and because of the erroneous principles on which it was founded.

It is respectfully urged, therefore, that the allowance of interest on the judgment of 1910 from the date of the original judgment (1902) was clearly erroneous for the two reasons indicated: (1) the lack of any statutory authority for awards of interest in such cases as this, and (2) the fact that the judgment of 1910 was based upon a mandate from the Supreme Court of the Islands wholly reversing the former judgment of 1902, and thereby relieved appellant from any legal or moral obligation to pay the whole or any part of that original judgment so set aside.

Conclusion.

For the reasons stated above, we think the branch of the case that is now at bar should be remanded to the Supreme Court of the Philippine Islands with a direction to order that that part of the complaint relating to it be dismissed for lack of jurisdiction in either the court below or the Court of First Instance of Iloilo to consider it or to render the judgment prayed for; that, if the court should be of opinion that this objection is not well taken, a new trial should be granted plaintiff in error and appellant in conformity with the provisions of law and the practice in the Islands, and that, in any event, the items above indicated should be eliminated from the judgment of December 5, 1910, particularly that the allowance of interest made in that judgment should be set aside.

Respectfully submitted,
Rufus S. Day,
Charles Edmond Cotterill,
Attorneys for Plaintiff in Error and Appellant.

Edmund W. Van Dyke,
Of Counsel.

6

Office Supreme Court, U.
FILED
APR 20 1916
JAMES D. MAHER
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 216.

ESTEBAN DE LA RAMA, *Plaintiff in Error and Appellant,*

vs.

AGUEDA BENEDICTO DE LA RAMA.

BRIEF IN REPLY TO BRIEF FOR DEFENDANT IN ERROR AND APPELLEE.

RUFUS S. DAY,
CHARLES EDMOND COTTERILL,
Attorneys for Plaintiff in Error and Appellant.

EDMUND W. VAN DYKE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 216.

ESTEBAN DE LA RAMA, *Plaintiff in Error and Appellant,*

vs.

AGUEDA BENEDICTO DE LA RAMA.

BRIEF IN REPLY TO BRIEF FOR DEFENDANT IN ERROR AND APPELLEE.

THE CHARGE OF MALA FIDES.

We desire at the outset to refer to an obvious attemp' that is made in the brief of counsel for defendant in error and appellee to secure for her unmerited sympathy and as it seems to us, to prejudice the court against the contentions of our client.

"This is a case," counsel for Madam De la Rama assert, "in which a husband who has most grievously injured his wife and has not supported her for some twenty-four years,

still seeks to avoid the fulfilment of any of his obligations to her and interposes every obstacle afforded by complicated legal procedure for this purpose" (see their brief, p. 17). "The present appeal," they say in another place (p. 3), "is on such unsubstantial grounds as to render inevitable the inference that it was taken for delay," and on page 17 again they add: "He" (the husband) "is entitled to no consideration and should not be allowed to obtain any further delay."

Whether this appeal is on substantial or unsubstantial grounds is of course a question to be determined by this court, not by counsel for the defendant in error and appellee. We can only assure the court that, in our opinion, the inference drawn by counsel for the wife is not inevitable; that the contentions we have presented in our principal brief have been presented in good faith, and that we believe them to be well founded in law. With respect to the other statements above quoted, we desire to point out that there is not one fact or circumstance set forth in the record that justifies any such deductions and charge, but much to show that, under the circumstances, they are utterly absurd.

The record shows that the parties were married on the 9th of July, 1891; that in August, 1892, they separated; that the various acts of adultery of which the husband was accused are charged to have begun as early as December, 1892; that it is alleged by the wife that he lived with the first of his paramours in the same province in which she (the wife) was living at the time. Yet her suit for divorce, alimony, separation of the conjugal partnership property, etc., was not begun until the 29th of October, 1901, *nearly nine years afterwards.* It is further shown that the husband's defense in part was that the wife herself had been guilty of adultery several months before his own misconduct is alleged to have begun; that his belief in her

guilt was the cause of his having left her, and that there was evidence tending to prove that the cause in fact existed.

The record further shows, it is true, that when the case had been reached for trial in the Court of First Instance and judgment had been rendered against him, the husband appealed to the Supreme Court of the Islands, but it shows also that he was *successful* in that appeal; that the latter court held with him and dismissed the complaint of the wife because it was thought that that charge of his by way of recrimination had been substantiated; that thereafter it was *the wife,* of course, not the husband, who appealed to this court and thus prolonged the litigation until the date of this court's decision; that even when this court in turn reversed the Supreme Court of the Islands, it did not hold that the husband's charge had not been proven, only that there was "no such *preponderance* of evidence in favor of the plaintiff's (the wife's) "guilt as authorized" the court below to set aside the conclusions of the trial court with reference to that branch of the case.

The record further shows that when the case was remanded by this court for further proceedings in accordance with its opinion and a motion was made by the wife that the judgment of the trial court as a whole be affirmed, *the husband was again successful.* The court below held that in arriving at the amount awarded the wife as the value of her share of the conjugal partnership property, the trial court had applied wrong principles and the case was for that reason sent back for a new trial. The record further shows that the new trial was had in December, 1907, only nine months after the date of that second decision of the Supreme Court of the Islands, but that the decision that resulted from the retrial was not announced until the 5th of December, 1910, three years after the new trial was had: that during those three years, the judge before the case

was retried resigned, and that another judge was called in to take charge and dispose of the case.

The record also shows that on that retrial—at least to some extent—*the husband was once more successful*, for the amount that had been awarded the wife in the first judgment as the value of her share in the partnership property was considerably reduced. The record further shows that to that second judgment *both* parties took exceptions; that they *both* moved for a new trial, and that *both* then appealed to the Supreme Court of the Islands. That court, it is true, affirmed the judgment below as rendered, but it was claimed by the husband that there still had been error and this time, as the wife herself had done on the other occasion, *he* appealed to this court for redress. The Supreme Court of the Islands evidently thought the grounds not too unsubstantial, for it granted both the writ of error for which he prayer and the appeal.

In view of such a state of affairs as is thus disclosed, the charge made by counsel for the wife in this court, it seems to us, is (to put it mildly) peculiarly unwarranted and unjust. Guilty though the husband may have been in one respect (adultery), he was not an outlaw, he had his status in court, he had a right to a trial of the sort for which the law provides, he had a right to have the provisions of law that are applicable to cases like his properly interpreted and applied, and surely he had a right by appeal to this court to seek enforcement of those other rights if he believed that he had been deprived of them and if the errors he alleged were sufficient in the opinion of the court below to justify the allowance of the appeal.

It seems to us that in attempting to invoke for their client the sympathy of this court on such a score as delay, counsel for the defendant in error and appellee only place themselves in the incongruous position of admitting in effect

the contrary of the very assertion they make, since if the grounds of appeal are really so "unsubstantial as to render inevitable the inference that it was taken for delay," the court might with perfect safety, we should think be left to deal with the grounds as in that event they would deserve to be dealt with, unaided by any extraneous considerations, or, rather, considerations not shown to be warranted by anything that is disclosed in the record.

As to the assertion that *plaintiff in error and appellant "is entitled to no consideration* and should not be allowed to obtain any further delay" becase "he has not supported his wife for some twenty-four years," and because he "still seeks to avoid the fulfilment of any of his obligations to her and interposes every obstacle afforded by complicated legal procedure for this purpose," we refrain from making the comments that suggest themselves from a viewpoint of law. They are sufficiently obvious. It is enough, we think, to call attention, as we have above, to the fact that the wife waited nearly nine years of the twenty-four years before making any attempt to compel him to perform his obligation to support her and that even then the attempt was not in the nature of an action for maintenance. Since suit was brought of course the matter has been in litigation and the husband has never been required by the courts to pay any alimony except for a very short period.

In other words, the wife waited until five years after the husband had inherited his fourth of his father's estate and had gone into business with his brother and sister—though during that time it is to be presumed that he was in a position to support her, since the operations of the firm were shown to have been profitable—and she did not then ask that he be required to contribute to perform his obligation to maintain her but sought instead a species of relief that must necessarily terminate that obligation altogether and yield

her once for all, simply a share, no matter how small its value might turn out to be, in whatever amount he might be found to have accumulated in the form of conjugal partnership property during those five years.

Taking into consideration, we respectfully submit, the husband's long separation from his wife, the cause of it—at least what he says in his answer that he believed to the cause—his belief, in view of that cause, that he was under no obligation to support his wife, her failure during all those years to take any action looking to the enforcement of any obligation that he may really have been under, her laches in bringing even the suit for divorce and separation of the conjugal partnership property, and the many errors that have been committed by the courts below throughout the proceedings in the case, it is not strange that he should have sought, and should still seek, to have that obligation definitely ascertained and fixed by the court in accordance with what he conceives to be the law. It is clear from the above that that is all that the record shows that he has done and is seeking now to do.

It is also clear that any *unnecessary* delay that may have occurred in the *conduct of the proceedings* can properly no more be attributed to him or his counsel than to the wife or her counsel. To do so would be to impute to the wife or her counsel a lack of diligence on their part, for it is ridiculous to suppose that mere dilatory tactics by the husband or his counsel in the matter of the conduct of the proceedings themselves could have been responsible for any great amount of delay if there had been no negligence on the other side—that is, if the wife's attorneys had availed themselves of all the means the law and rules of court provide for expediting litigation.

As to Point I of Our Principal Brief.

With reference to our contention that, under the circumstances in this case, the courts are without jurisdiction of the branch of it that is now being considered, because the causes of action should have been sued on in separate proceedings, counsel for Madam De la Rama say in their brief (p. 7), that the "practice of awarding a divorce and liquidation in the same judgment is followed in the various States of the Union * * * in which the legal system is in part founded upon Spanish law," and cite a number of cases. What relevancy they can have we do not see, since, respecting cases of this character, the code provisions of the States referred to are essentially different from the ones that were in effect in the Philippines at the time the suit in the case at bar was begun.

Counsel for defendant in error and appellee say further (id.) that "even if the two branches of relief were founded upon separate causes of action, the Philippine Code of Civil Procedure expressly permits joinder." They do not, however, favor the court with a citation of any provision of that Code which so expressly permits. The only provision which, after careful search, *we* were able to find, either in the Code of Civil Procedure or in any other statute, which as it seems to us, could have any possible bearing on this phase of the matter is the one we have quoted on page 28 of our principal brief; and that provision, we think we have conclusively shown, can not properly be held to apply in a case like the one at bar.

Next counsel for Madam De la Rama go on to say (p. 8) that because the husband "did not raise any objection on the ground of misjoinder, either by demurrer or answer, but simply took issue on the facts and alleged that there was no conjugal property," he has no right to urge any such ob-

jection in this court on appeal, and in this connection they quote from the Compiled Acts of the Philippine Commission a section providing that "if no objection be taken to the complaint either by demurred or answer, the defendant shall be deemed to have waived all objections, excepting only the objection to the jurisdiction of the court" etc. (Code Civ. Pro. Sec. 93.)

But as we thought we had explained very fully in our principal brief, it is not our idea that what was done in this case involves a mere technical irregularity, a mere misjoinder of causes of action that can be cured by waiver. It is our contention that the provisions of the Spanish Civil Code that were in effect in the Islands at the time this suit was brought plainly require two actions; that there are the best of reasons why separate actions should be required; that that requirement was recognized and observed in the Philippines prior to the proceedings in this case and has never been repealed; that, since Section 1433 of the Spanish Code provides that, " in order that the separation" of the property "may be decreed, it shall be *sufficient* to present the final judgment against the guilty spouse," nothing less can be sufficient, and that such presentation is a *prerequisite* to the entertainment by the court of any application of the character that was made in this case.

It is our contention that, even if the provision of the American Code of Civil Procedure (which counsel for Madam De la Rama do not cite), could properly be construed to have changed the practice in this regard, it is still necessary to file a petition *after* the judgment of divorce, and whether this supplementary proceeding be made a part of the original action or not, containing the requisite jurisdictional averments; that it is the cause for divorce that constitutes the cause for the separation of the property; that until that cause is established by the judgment of di-

vorce, the court has no power to act with reference to the separation of the property; that there must be a *supplementary decree of separation* of the property; that there must also be supplementary, and, therefore, a separate, trial with reference to the matters involved in the liquidation, and that the liquidation must be made as of the date of the supplementary decree just mentioned.

In addition to the commentaries and other authorities cited in our principal brief, we think it may be useful to remind the court that this appears to have been the construction placed on the law in Porto Rico, where the same Code that we are now considering was formerly in effect. In the case of *Garrozi* v. *Dastas* (204 U. S., 64, 68-9), decided by this court in 1907, the wife filed a petition pending the disposal of a suit by her husband for divorce. The purpose of her petition was to secure the setting aside of certain supposedly fraudulent contracts by virtue of which the husband was seeking to avoid payment of alimony on the ground of insolvency. At the instance of the husband the case was removed from the local court in Ponce to the District Court of the United States for Porto Rico, and came to this court on appeal. In the statement of the case, this court says:

> "The petition of the wife was amended and reformed, authority being given by the court for the prosecution of the suit on her behalf by her representative or next friend. The petition in its final form was less prolix and the allegation was added that the divorce proceedings between the husband and wife referred to in the original petition had gone to the Supreme Court of Porto Rico and had by that court been finally decided, decreeing a divorce in favor of the husband. The prayer for relief was amended to conform to this situation; that is, it was prayed, not only

> that the simulated contracts be set aside, but, further, that the community be liquidated and the wife awarded her share."

That is, although a suit for divorce was pending at the time, the wife did not in her answer or in a cross-bill pray for a separation of the conjugal partnership property, but waited until the divorce had actually been granted and then, in an independent proceeding, though one instituted with another purpose in view, amended the petition she filed in the latter proceeding by inserting the jurisdictional averment with respect to the rendition of the judgment of divorce and to that amendment added her prayer for separation of the property. It seems only fair to assume that if it had not been regarded as necessary for her to await final action in the matter of the divorce, the prayer would have been inserted in the pleadings in the divorce case or else in the original petition in the proceeding to set aside the simulated contracts. Otherwise why should she have waited?

This question being one, therefore, in which the element of jurisdiction is involved, and not one of mere technical irregularity, it may be raised at any stage and by either a party in the case or by this court itself. It will be noted that questions of jurisdiction are in terms excepted from the operation of the provision of the Code of Civil Procedure cited on page 8 of the brief of counsel for the defendant in error and appellee (and quoted hereinabove), but, apart from that, this court held unequivocally in the case of *Mansfield, Coldwater & Lake Michigan Railway Co.* v. *Swan* (111 U. S., 379, 382) that:

> "The rule springing from the nature and limits of the judicial power of the United States is unquestionable and without exception which requires this court,

> of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called on to act. *On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court and then of the court from which the record comes.* This question the court is bound to ask and answer for itself, even when not otherwise suggested and without respect to the relation of the parties to it."

The court then examines a long line of cases on the subject and quotes from them to the same effect. In the later case of *Minnesota* v. *Hitchcock* (185 U. S., 382), it is said:

> "A preliminary question is one of jurisdiction. It is true, counsel for the defense did not raise the question and evidently desire that the court should ignore it and dispose of the case on the merits. *But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws.* It is the duty of every court, of its own motion, to inquire into the matter irrespective of the wishes of the parties and to be careful that it exercises no powers save those conferred by law. *Consent* may waive an objection so far as respects the person but it *can not invest a court with jurisdiction which it does not by law possess over the subject-matter.*"

True, the courts of the Philippines may not be "United States Courts" within the meaning of that expression as used in the above quotation, but they are courts created by the Government of the United States, in possessions of the United States, and appeals may come from them to this

court. They must, therefore, it seems to us, be within "the judicial power of the United States," and, if so, the principle above stated would appear to be applicable as well to them as to the United States courts in the States themselves.

Also, the objection made by counsel on the other side to the effect that the matter of which we complain is "merely procedural" and for that reason without merit would seem to have no relevancy in such a case as this. So, for instance, are the methods to which resort may be had to obtain reviews by this court of decisions of the Supreme Court of the Islands, yet this court held in the cases of Behn, Meyer & Company and Gsell (205 U. S., 402, and 239 U. S., 93) that if the appealing party should come up by the wrong method, there is no jurisdiction here to review the decision appealed from and that the writ of error or appeal, as the case may be, must be dismissed.

Counsel for Madam De la Rama further contend that "the practice of determining all the questions in a single judgment is" not only "firmly established in the Philippines" but "has twice been relied on by this court as the basis of its appellate jurisdiction." In support of this they cite the decision on the former appeal in this case (201 U. S., 303) and *Villanueva* v. *Villanueva* (239 U. S., 293). From those decisions, we respectfully submit, such a conclusion should by no means be held to result. With reference to jurisdiction, the decision in the Villanueva case simply follows that of the former appeal in the case at bar and goes no farther. On the same point, the decision of the former appeal in the case at bar had to do with an entirely different phase of the matter from the one here presented.

It is true that this court said in the opinion respecting the former appeal that "the right of the plaintiff to her

proportion of the conjugal property, to alimony pending suit and to other allowances claimed is the basis of our jurisdiction." On the former appeal, however, the question being considered was *whether the courts had jurisdiction in the matter of the divorce,* not in the matter of the separation of the property under circumstances like these. Ordinarily it had not jurisdiction in divorce cases, the court said, but pointed out that the statute whereunder appeals are taken from the Supreme Court of the Philippines to this court provides for the review of final judgments and decrees of that court in *all* cases "in which the value in controversy exceeds twenty-five thousand dollars," then went on to explain:

> "For the purpose of jurisdiction, it makes no difference whether the amount claimed be termed alimony or the wife's share of the community property. It is sufficient that she claimed to be entitled to an amount exceeding $25,000. * * * By the decree of the Supreme Court" (below) "she was denied all recovery of any description upon the ground of her adultery. If, upon a review of the testimony, it should be found that she was not guilty of adultery, she would unquestionably be entitled to one-half of the conjugal property. * * * Our conclusion upon this branch of the case is that the appeal was properly taken and that it calls for a re-examination of the grounds upon which the petition for a separation of the conjugal property and alimony *pendente lite* was denied" (*i. e.,* the grounds on which she was held guilty of adultery).

"The decree of the Supreme Court" (below) "dismissing the plaintiff's petition," the court ended by saying, "renders it unnecessary to review the action of the Court of First Instance in fixing the amount which it held plaintiff was entitled to recover."

This, therefore, is not a holding that the jurisdiction of this court to consider the question of divorce depended upon the validity of the money claim made by the wife or on its jurisdiction, under every conceivable circumstance, to pass upon the amount awarded by the trial court in satisfaction of that claim. It will be observed that the statute above quoted from provides that to entitle an appellant to review in this court, "the value in controversy" shall exceed $25,000—that the court said that "it is sufficient" to confer jurisdiction here "that she *claimed* to be entitled to an amount exceeding $25,000." The court did not go into the merits of the claim, or give any consideration to the question as to whether it had jurisdiction of it under the circumstances now presented. It simply held "if upon a review of the testimony, it should be found that" the wife "was not guilty of adultery, she would unquestionably be entitled to one-half of the conjugal property."

So she would, of course. And unquestionably this court would have jurisdiction to consider that claim on appeal and to pass on the justice of the award in satisfaction of it, if the provisions of law relating to the procedure and prescribing the conditions on which the trial court might itself acquire jurisdiction had been complied with. But they were not. As we have shown in our principal brief, not a single essential requirement of the Code that was in effect at the time was observed; and it seems to us too clear for useful argument that this court could not, merely by having made that claim the basis of its jurisdiction to consider another branch of the case have estopped itself forever after from considering the question of its jurisdiction of an appeal from a judgment allowing it under any and all circumstances that may have been involved in its consideration by the courts below.

THE RETRIAL IN THE COURT OF FIRST INSTANCE.

In support of their contention that the designation of Judge McCabe by Judge Ross to take charge and dispose of the case after the resignation of Judge Norris before whom the trial was had and who resigned without having announced his decision, was in accordance with law, counsel for defendant in error and appellee quote in their brief, p. 9) a section from the Compiled Acts of the Philippine Commission *that had been repealed* at the time of the designation in question, and which had been superseded by the sections of the Code of Civil Procedure that we have set forth on pages 35 and 36 of our principal brief.

The Compiled Acts of the Philippine Commission, it is true, were published in 1907, some time before the designation of Judge McCabe was made, but it is evident from what follows that it was not the intention of the Commission thereby to re-enact anything that that compilation contains. This appears from a preface that was inserted by the committee of lawyers that prepared it. "Attention is invited," they say, "to the fact that the following compilation, as approved by the Philippine Commission, is printed and published merely for the convenience of the public and that said compilation does not have the effect of varying or amending the laws and amendments thereof as originally enacted by said Commission," and they quote a resolution of the Commission where in what they state is in substance provided.

If, therefore, the section quoted by counsel for Madam De la Rama had already been repealed, the fact that it was included in the compilation could not have revived it. It originally appeared as part of an act of the Philippine Commission of June 11, 1901, the act that created the present system of courts. The sections

quoted in our principal brief at pages 35 and 36 are contained in the Code of Civil Procedure, which was enacted subsequently and Section 795 of which provides that "all codes, statutes, acts," etc., *"and parts thereof,* heretofore promulgated," etc., in the Philippine Islands, prescribing the procedure in civil actions," etc., "are hereby repealed, and the procedure in all civil actions and special proceedings in all courts and tribunals shall hereafter be in accordance with the provisions of this act."

Nothing could be plainer. Besides, those subsequent sections of the Code that we have quoted in our brief cover the whole subject-matter, are evidently intended as a substitute for the former provision, and, if the former provision had not been expressly repealed by the repealing section itself, would have had the effect of repealing it by necessary implication. (See 11 Ency. U. S. Sup. Ct. Rep., pp. 94-99.) There is no doubt, it seems to us, that the intention of the Commission was to revoke the authority it had formerly granted to disqualified judges to appoint their substitutes in the cases in which they were disqualified and to provide that those substitutes should be designated by other officers more likely to be impartial.

In reply to what counsel for defendant in error and appellant have to say about the *competency* of Judge McCabe to decide the case on the record of the trial before Judge Norris and without having heard the witneses himself, etc., we do not regard it as necessary to do more than remind the court of what we have suggested in this respect in Point III of our principal brief (pp. 39, *et seq.*), for what we have there said seems to us to answer the assertions of counsel on the other side conclusively.

INTEREST.

The two code provisions quoted on pages 15 and 16 of the brief of counsel for the defendant in error and appellee have no effect on such a situation as that which is presented in the case at bar. The provision referred to on page 16, and which quoted from the Civil Code, contains no specific reference to the interest that may be allowed by the courts on judgments. It purports simply to limit the indemnity that may be demanded by a creditor for losses and damages attributable to default of the debtor in the payment of a money obligation to such interest as may be agreed upon by the parties, except when there is a stipulation to the contrary, and, in the absence of any agreement, to limit the indemnity to interest at the legal rate.

The section that is quoted on page 15 from the Code of Civil Procedure has reference only to the interest that may be allowed for the interval between the date of a judgment that is before the Supreme Court of the Islands for review in any particular case and the date of that court's own judgment affirming or reversing it. The provision is that "when the Supreme Court" (of the Islands) "shall affirm a judgment of the court below for the recovery of money, or shall reverse a judgment of the court below and award a sum of money as debt or damages, it shall direct that interest be added to the original judgment" (i. e., the one affirmed or reversed as a result of the appeal then at bar), "or the sum determined to be due" (meaning the sum determined by the upper court to be due), "from the date of the former judgment" (i. e., the one affirmed or reversed) "until the date of the final judgment, at the rate of six per centum per annum."

It contains no provision for the allowance of any interest whatever for the interval between the date of a reversed judgment and the date of a second judgment rendered as a result of a new trial. Indeed, counsel for the defendant in error and appellee admit that "there appears to be no statute expressly regulating this question" and their whole argument in relation to this point amounts to a simple begging of the question, for it ignores altogether the fact that, under the principle established by this court in the cases cited in our principal brief (pp. 70, 71), the appellant can not, merely because the trial court proceeded on a wrong theory and was guilty of error in arriving at the amount for which it rendered judgment, be charged with a burden of this character. As we have pointed out in our other brief, interest is in the nature of a penalty. How could there be any justice in penalizing a defendant for having appealed successfully from a decision improperly rendered against him, based on some theory that is not applicable under the law?

And further: the section of the Code of Civil Procedure relied on relates obviously to judgments in actions for the *recovery of money,* and *as debt or damages,* neither of which form of judgment was the one sought in the case at bar. Here there was of course no claim for damages. Nor was there any money indebtedness *per se* at the time the judgment was rendered, and, as we contend, there has been none since. What the law gave the wife the right to sue for —and this only after she had obtained her judgment of divorce—was the separation and return of her dowry and parapherna, if any, and her one-half share in the conjugal partnership property, of whatever it might consist, whether in the form of real estate or money or in the form of personal property of any other sort.

The character of the interest of the wife in the conjugal partnership property is explained in the case of *Garrozi v.*

Garrozi (204 U. S., pp. 78 *et seq., supra*). There this court said:

> "It is provided in both the Code of 1889" (the one that was in effect in both the Philippines and Porto Rico at the time the suit in the case at bar was brought) "and the Code of 1902" (a later Porto Rican Code) "that the husband 'is the administrator of the conjugal partnership.' * * * The very foundation of the community and its efficacious existence depend on the power of the husband, during the marriage, over the community, and his right, in the absence of fraud or express legislative restriction, to deal with the community and its assets as the owner thereof. The purpose of the community, as expounded from the earliest times, whilst securing to the wife, in the dissolution of the marriage, an equal portion of the net results of the common industry, common economy and common sacrifice, was yet, as a matter of necessity, during the existence of the community, not to render the community inept and valuless to both parties by weakening the marital power of the husband as to his expenditures and contracts, so as to cause him to be a mere limited and consequently inefficient agent."

Later on in the opinion (pp. 81, 82), after showing that this principle is in effect in Spain, France, Louisiana and other places wherein the community system prevails, the court quotes the following from the case of *Guice v. Lawrence* (2 La. Ann., 226):

> "The laws of Louisiana have never recognized a title in the wife, during marriage, to one-half of the aquets and gains. The rule of the Spanish law on that subject is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has *gananciales*, nor is she to prevent the husband from using them, under the

> pretext that the law gives her one-half. But, *soluto matrimonio*, she becomes irrevocably the owner of one undivided half *in the manner provided by law for ordinary joint ownership*. * * * The provisions of our Code on the same subject are the embodiment of those of the Spanish law, without any change."

Thus it appears that, on the dissolution of the marriage, the interest of the wife is that of a *joint owner*. As joint owner, she could, of course, have instituted any suit for damages against her husband under the circumstances in this case, nor could she have instituted any for mere debt. Therefore, the provision of the Philippine Code of Civil Procedure quoted in counsel's brief, we should think, could not possibly be held applicable.

We think we have shown, too, that the wife in this case was without authority of law to sue even as joint or community owner before having obtained her final judgment of divorce; that she has brought no suit of that character since the final judgment in that branch of the case was rendered; that neither she nor the trial court has complied with any of the other jurisdictional requirements of the Civil Code, and that, therefore, there is no valid judgment in existence with respect to this conjugal property branch of the case. As a consequence, there is nothing on which interest could be allowed.

The statement made on page 16 of the brief to which we are replying: that "as soon as the judgment of divorce became operative, the husband was under an obligation to turn over to the wife her share of the conjugal property," and that for that reason "it was entirely proper to charge him with interest for his delay in doing so," would not seem to be in harmony with the decision of this court in the Garrozi case and the authorities cited in the opinion. It is certainly in conflict with Article 1433 of the Civil

Code, which provides that "in the absence of specific declaration in the marriage contract, the separation of the property of the spouses during marriage" (and marriage in the Philippines can only be dissolved by death) "shall not take place except by virtue of a judicial decree." Such an obligation, therefore, could not have arisen, for even at this late day the wife has caused no such decree to be made.

Conclusion.

In the brief of counsel for defendant in error are many other statements either not pertinent or of like inaccuracy. For example, in connection with their criticism (p. 14) of our point that certain amounts embraced in the judgment below were based on conjecture, they cite the case of *Piza Hermanos* v. *Caldentey* (231 U. S., 690), to show that, as they put it, "it has recently been held by this court that, in the determination of partnership shares, it was not error to include estimated or prospective shares as a factor," though the transaction involved in that case was a purely business transaction and not a partnership in conjugal property between a husband and his wife. It is clearly distinguishable from the case at bar because the transaction there in question was not, of course, governed by the provisions of the Civil Code relating to liquidation of conjugal partnership property in a case like this.

Another example is on page 11. There they say that we "are not entitled to require this court to consider" the points made in our principal brief, that were omitted from the assignments of error filed with the petitions in the court below. "The power of this court," they contend, "to notice a plain error not assigned is exercised only to prevent some manifest injustice and can not be invoked as to mere matters of local procedure in the court below not involving

any substantial right." This may be so, though the court places no such limitation on itself in Rule 35. It is on this very ground, however, *i. e.*, that the court, by considering the errors so unassigned, can prevent manifest injustice, that we are seeking to invoke the court's power in the matter. About every conceivable right, as it seems to us, to which the husband was entitled under the law has been ignored by the courts below and the errors assigned in the points counsel on the other side criticise we regard as among the most important in the case and as among the most prejudicial to the interests of our client.

But, in view of the length to which this reply has already been extended, we content ourselves now with only the general comment with respect to the other statements and contentions that we should like to notice, that, as it appears to us, counsel for the defendant in error and appellee have failed in their brief to present to the court any considerations that ought to be given weight in the disposal of the questions suggested by the state of affairs disclosed by the record on this appeal.

Respectfully submitted,

RUFUS S. DAY,

CHARLES EDMOND COTTERILL,

Attorneys for Plaintiff in Error and Appellant.

EDMUND W. VAN DYKE,

Of Counsel.

Office Supreme Court, U. S.
FILED
APR 10 1916
JAMES D. MAHER
CLERK

1

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 216.

ESTEBAN DE LA RAMA,
Plaintiff-in-Error and Appellant,

vs.

AGUEDA BENEDICTO DE LA RAMA.

Brief for Defendant in Error and Appellee.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Defendant in Error and Appellee,
2 Rector Street,
New York.

ROYAL LAW PRINTING CO., 79 WALL STREET, N. Y.

Supreme Court of the United States,

OCTOBER TERM 1915.

No. 216.

ESTEBAN DE LA RAMA,
Plaintiff in Error and
Appellant,

vs.

AGUEDA BENEDICTO DE LA RAMA.

BRIEF FOR DEFENDANT IN ERROR AND APPELLEE.

This case is a flagrant instance of the law's delay. In 1892, the year after the parties were married, the husband (the appellant here) deserted his wife and thereafter lived in open adultery with several different women (Rec. pp. 7, 9). After the establishment of American rule had given some effectual legal protection to women in the Philippines, the wife (the appellee here) instituted this action for a divorce and liquidation of the conjugal property.

This suit was begun on October 29th, 1901, more than fourteen years ago (Rec. p. 1). The case was promptly brought to trial and on July 5th, 1902, was decided in favor of the wife. Judgment was entered on that day "suspending" the marriage relations of the parties and awarding to the wife 3,200 pesos alimony for the eight months during which the action had been

pending and 81,042.76 pesos as her share of the conjugal property (Rec. p. 21).

An appeal having been taken by the husband to the Philippine Supreme Court, that Court, on May 16, 1903, reversed the judgment of the Court of First Instance on the facts, held that the husband's defence of recrimination was made out, and dismissed the complaint (Rec. p. 26, 3 Phil. Rep. 34). The wife then appealed to this Court, which, on April 2nd, 1906, reversed the Philippine Supreme Court, held that its review of the facts was unauthorized and remanded the cause to the Philippine Supreme Court (201 U. S. 303). The wife then moved for a general judgment of affirmance. The Philippine Supreme Court on March 13th, 1907, entered a judgment affirming the Court of First Instance as to the award of alimony, but held that the liquidation of the conjugal property had been erroneous in method, and sent the case back to the Court of First Instance for a new trial of this question (Rec. pp. 34, 36, 7 Phil. Rep. 745). Two of the seven justices dissented and held that there should have been a general affirmance (7 Phil. Rep. 745, 752, 754). Then ensued further delays, and not until December 5th, 1910, was judgment entered after the second trial. This judgment worked out a new liquidation of the conjugal property and awarded to the wife 58,543.37 pesos as her share *as of July 5, 1902*, with legal interest from that date (Rec. pp. 49, 50). This judgment was unanimously affirmed on appeal by the Philippine Supreme Court on October 9th, 1913 (Rec. p. 52), and judgment of affirmance was entered on October 30th, 1913 (Rec. p. 60). The husband then appealed to this Court and also took out a writ of error.

The following table shows at a glance the various dates and periods of the litigation:

October 29, 1901. Suit begun.

Eight months.

July 5, 1902. Judgment of divorce.

Ten months.

May 16, 1903. Reversal by Philippine Supreme Court.

Two years, eleven months.

April 2, 1906. Reversal by United States Supreme Court.

Eleven months.

March 13, 1907. Second decision of Philippine Supreme Court.

Three years, nine months.

December 5, 1910. Judgment after new trial.

Two years, eleven months.

October 30, 1913. Third Decision of Philippine Supreme Court.

Two years, five months.

April , 1916. Argument of second appeal in United States Supreme Court.

The present appeal to this Court is on such unsubstantial grounds as to render inevitable the inference that it was taken for delay. The appellant presses only four contentions, which may be briefly summarized as follows:

1. That the joinder, in a suit for divorce, of a demand for a liquidation of the conjugal property was improper.

2. That the Judge who rendered the second judgment of the Court of First Instance had no power to do so.

3. That the liquidation was not based upon a proper inventory.

4. That the allowance of interest from July 5, 1902, was improper.

Points 1 and 2 were not raised in the Court below upon the present appeal, nor are they presented by any assignments of error. Points 3 and 4 present questions of fact and of local law as to which this Court will follow the concurrent conclusions of the two Courts below unless clearly erroneous.

Counsel for the Appellee have not yet received Appellant's Brief in printed form, and therefore cannot refer to its page numbers.

Brief of the Argument.

I. The Trial Court had power to award a divorce and liquidate the conjugal property in the same suit.

II. The Judge who rendered the judgment of December 5th, 1910, had power to do so.

III. The appellant has no standing to attack in this Court either the joinder of relief or the jurisdiction of the Trial Judge.

IV. The liquidation was properly made and the objections now urged against it present nothing for review.

V. The allowance of interest was proper.

VI. Any further delay would work grave injustice.

VII. The writ of error should be dismissed for want of jurisdiction.

POINT I.

The Trial Court had power to award a divorce and liquidate the conjugal property in the same suit.

Appellant's counsel argue very learnedly and at great length that because under the Spanish procedure the liquidation of conjugal property might be effected in a separate proceeding at the foot of the decree of divorce, it was error in this case to award the entire relief to which the wife was entitled in a single judgment. This objection is purely procedural and is without merit even from that standpoint. The jurisdiction of the Trial Court to grant a divorce and to liquidate conjugal property is too firmly established to be questioned and, in fact, is not questioned. The two forms of relief do not depend upon separate causes of action: one grows out of the other. Certain facts constitute a cause of action for divorce; a divorce terminates the marriage partnership and thus requires a liquidation of the conjugal property, if there is any to liquidate. It is merely a matter of procedural convenience whether all the questions shall be tried at once, or whether there shall be first a judgment of divorce and then a supplemental judgment of partition. The practice of determining all the questions in a single judgment is firmly established in the Philippines and has twice been relied on by this Court as the basis of its appellate jurisdiction.

See

De la Rama vs. De la Rama, 201 U. S. 303;

Villanueva vs. Villanueva, 239 U. S. 293.

When the case at bar was before the Philippine Supreme Court on remand from this Court, this question was raised and determined as follows:

> "The fifth assignment of error is as follows:—
>
> *"Se ha infringido el artículo 1418 y otros "del Codigo Civil al admitir el Juzgado, dentro "del presente juicio, el avalúo y división "efectiva de los supuestos bienes gananciales."
>
> "It was claimed by the defendant, in his "brief in his original appeal to this court in "support of this assignment of error, that it "was not proper to settle the affairs of the "conjugal partnership in the divorce pro- "ceeding, and that no such settlement of a "conjugal partnership could ever be made "until there had been a final judgment order- "ing the divorce, from which no appeal had "been taken, or as to which the time to ap- "peal had expired, and in his argument in "this court in the motion presented on the "2nd of November, 1906, he repeats the same "claim.
>
> "In our opinion, however, this assignment "of error was disposed of by the decision of "the Supreme Court of the United States. "As was said in that decision, the jurisdic- "tion of that Court depended entirely upon "that part of the judgment of the Court of "First Instance which directed the payment "of 81,000 pesos. If the Court of First In- "stance had no jurisdiction to make any "order for the payment of money in a divorce "proceeding, that part of the judgment would "have to be eliminated. In taking jurisdic-

---

*(Translation) "The Court violated Article 1418 and others of the Civil Code by including in the present judgment the appraisal and actual division of the supposed property acquired during marriage."

"tion of the case the Supreme Court of the "United States necessarily held that a liqui- "dation of the affairs of the conjugal part- "nership could be had in a divorce proceed- "ing. The fifth assignment of error, there- "fore, can not now be urged by the defend- "ant."

See

De la Rama vs. De la Rama, 7 Phil. Rep. at pp. 748, 749.

No exception to this ruling appears to have been taken by the defendant.

The same practice of awarding a divorce and liquidation of the conjugal property in the same judgment is followed in various States of the Union in which conjugal partnerships in property are recognized, and in which the legal system is in part founded upon Spanish law.

See

Delesdernier vs. Delesdernier, 45 La. Ann. 1364;
Lozengheim vs. Martin, 7 La. Ann. 180;
Duncan vs. Brown, 139 Pac. Rep. 140 (New Mexico);
Howe vs. Howe, 4 Nev. 469;
Harman vs. Harman, 1 Cal. 215;
Kashaw vs. Kashaw, 4 Cal. 312;
Rice vs. Rice, 31 Tex. 174.

Even if the two branches of relief were founded upon separate causes of action, the Philippine Code of Civil Procedure expressly permits joinder. Under all systems of pleading objections on the

ground of misjoinder or multifariousness must be taken *in limine* or they are waived.

See

Oliver vs. Piatt, 3 How. 333, at p. 412.

Under the local statute all objections to the form of a complaint, except insufficiency and lack of jurisdiction, are waived unless expressly taken by demurrer or answer.

See

Compilation Acts of Phil. Com., p. 241, §2500 (Code Civ. Proc. §93).

> §2500. EFFECT OF FAILURE TO OBJECT.—If no objection be taken to the complaint, either by demurrer or answer, the defendant shall be deemed to have waived all objections, excepting only the objection to the jurisdiction of the court over the subject-matter and that the complaint does not state facts sufficient to constitute a cause of action.

In the case at bar the defendant did not raise any objection on the ground of misjoinder either by demurrer or answer, but simply took issue on the facts and alleged that there was no conjugal property (Rec. p. 5). His counsel admit that he has had whatever benefit may be supposed to accrue from a separate *trial* of the questions arising on the liquidation, but urge a reversal on this purely theoretic and academic objection, which is wholly lacking in both legal and moral force.

POINT II.

The Judge who rendered the judgment of December 5th, 1910, had power to do so.

The designation of Judge McCabe to take the place of Judge Ross was in accordance with the local statute.

See

Comp. Acts. Phil. Com., p. 759, §2201:

> §2201. JUDGE MAY PRESIDE IN ANOTHER PROVINCE AT REQUEST OF JUDGE OF THAT PROVINCE.—A Judge of any Court of First Instance may hold the Court of First Instance in any province, at the request of the Judge thereof; and upon the request of the Secretary of Finance and Justice it shall be his duty to do so; and in either case, the Judge holding the Court shall have the same power as the proper Judge thereof.

It is manifest from the record that both parties acquiesced in the action of Judge McCabe in taking jurisdiction (See Rec. p. 38) and no objection to his having done so was made in the Philippine Supreme Court (See Rec. p. 57). The Court of First Instance had unquestioned jurisdiction, and Judge McCabe was a Judge of that Court. He had power to sit outside of his own District on a proper designation, and he was so designated in this case. The order designating him is not included in the Record and must be presumed to have been regular.

See

McDowell vs. United States, 159 U. S. 596.

It is wholly immaterial that the evidence was taken, in whole or in part, before another Judge. The parties evidently consented that the evidence so taken should be thus used, together with the evidence on the former trial, to obviate the necessity of taking it all over again (See Rec. pp. 34, 38). Appellant's counsel have evidently regarded it as quite immaterial what the evidence was, since they have seen fit to omit it altogether from the Transcript of Record. The second trial was in the nature of an accounting, in which the evidence might well have been taken out of Court, before a Referee or Commissioner. All the testimony previously taken might be regarded as depositions, and as such might be used by either party. See

Comp. Acts Phil. Com., p. 895, §2795.

> §2795. DEPOSITION MAY BE READ AT ANY STAGE OF ACTION.—When a deposition has been once taken, it may be read by either party in any stage of the same action or proceeding where the reception of evidence is proper, or in any other action between the same parties upon the same subject-matter, and is then deemed the evidence of the party reading it.

As this is not a criminal case, the parties might waive any procedural right, either expressly or by not objecting. Here the parties filed a written consent that the case might be decided by Judge McCabe, without waiting for the report of the assessors. This was more than a year after Judge Ross had withdrawn (Rec. p. 38). The consent is not included in the Record, and must be presumed to have been sufficient to waive any objection that might have been taken to the consideration of all the testimony previously taken.

POINT III.

The appellant has no standing to attack in this Court either the joinder of relief or the jurisdiction of the Trial Judge.

Appellant's counsel admit that the two objections just discussed are not presented by any assignments of error. They therefore are not entitled to require this Court to consider them at all. The power of this Court to notice a "plain error not assigned" is exercised only to prevent some manifest injustice, and cannot be invoked as to mere matters of local procedure in the Court below, not involving any substantial right.

Moreover, these objections were not passed upon by or presented to the Philippine Supreme Court, the proper tribunal in which to urge them, except so far as the objection to the joinder of relief was made upon the former hearing, after which it was dropped. The Record does not include the assignments of error which appear to have been filed on the last appeal from the Court of First Instance to the Philippine Supreme Court (Rec. p. 58), but it is evident from the opinion (Rec. p. 57) and from the motion for a rehearing (Rec. pp. 59, 60) that these two objections were not then even adumbrated.

The question now before this Court is whether the Philippine Supreme Court should or should not have affirmed the Court of First Instance. It cannot now be alleged as error that the court of intermediate appeal failed to reverse upon a ground which was not presented to it. The Court of last resort can review only such questions as were duly saved for such review in the Court of intermediate appeal.

See

The Vaughan & Telegraph, 14 Wall. 258.
San Pedro, &c., Co. vs. United States, 146 U. S. 120, 138.
McLoughlin vs. Raphael Tuck Co., 191 U. S. 267, 271.

Not only is there no merit in these two contentions of the appellant, but they are not even before this Court for consideration. The Philippine Supreme Court was authorized to determine, (aside from such review of the facts as is permitted in certain cases), "only questions of law raised by the bill of exceptions" (Comp. Acts Phil. Com. pp. 924, §2929). It could not consider a question not presented to it, and this Court certainly cannot reverse it for having complied with the law in this respect.

POINT IV.

The liquidation was properly made and the objections now urged against it present nothing for review.

The appellant does not seek to review the liquidation upon the facts. He could not do so, in any event, since the evidence is not included in the Record, and it does not appear that his motion for a new trial was such as to authorize the Philippine Supreme Court to review the facts (See Rec. p. 50). Under the present statute such review can be had only when the excepting party moves for a new trial "upon the ground that the

evidence was insufficient to justify the decision" (Comp. Acts Phil. Com., pp. 925, §2929b).

In substance appellant makes two objections to the liquidation:

(a) That it was not based upon a proper inventory, and

(b) That certain reserve funds and estimated profits were included in determining appellant's share of the assets of the firm of which he was a member.

These will be considered in order.

(a) The objection to the character of the inventory is baseless. The inventory itself is not included in the Record, and this Court cannot assume that it did not comply with all the substantial requirements of the local law, especially in view of the unanimous determination of the Philippine Supreme Court that the method adopted by the trial Judge "in liquidating the assets of the conjugal partnership was substantially in accord with the method prescribed in the Code and indicated in our opinion filed with our judgment remanding the case for a new trial" (Rec. p. 57).

The object of an inventory is merely to disclose the facts, and as the Philippine Supreme Court held "that the findings of fact by the Trial Judge are fully sustained by the evidence" (Rec. p. 57) and the evidence was not sent up with the Record, there is nothing for this Court to review in this regard.

By the appellant's own computations, as set forth in the opinion of the Trial Court, he in effect admitted that the wife was entitled to a share of the conjugal property amounting to

48,206.28 pesos, but claimed that she had already received on account the sum of 47,567 pesos (Rec. p. 43). The corrected computation in the Appellant's Brief fixes the amount of the wife's share at 49,206.33 pesos. The Trial Court found against the appellant on the facts as to the receipt by the wife of anything on account (Rec. p. 48), and on a re-statement of the figures awarded to the wife 58,543.37 pesos, only about 9,000 pesos more than the amount shown by the appellant's computations, as re-stated in Appellant's Brief.

(b) Appellant's counsel allege no error in the Trial Court's computations, except the inclusion of certain reserve funds and estimated profits in determining the amount of assets of the firm of "Hijos de I. de la Rama," of which appellant was a member.

It has recently been held by this Court that in the determination of partnership shares it was not error to include estimated or prospective profits as a factor.

See

Piza Hermanos vs. Caldentey, 231 U. S. 690.

In the case at bar the estimate of certain profits was evidently taken simply as the best evidence obtainable in default of evidence which could and should have been furnished by the appellant. It is thus simply one element in a finding of fact not now reviewable. Moreover, it does not appear that this contention was presented to the Philippine Supreme Court (See Rec. pp. 57, 58).

The same considerations apply to the inclusion of certain reserve funds. The Trial Court found

as a fact that the appellant's interest in such reserve funds amounted to a certain figure (Rec. p. 48), and no objection to this finding appears to have been urged in the Philippine Supreme Court. Even in Appellant's Brief it is only claimed that this reserve fund *may* not have been an asset. This Court cannot consider such mere conjecture, especially in the absence of both evidence and exception.

POINT V.

The allowance of interest was proper.

Appellant's counsel cite no statute or decision of the Philippine Islands adverse to the allowance of interest from the date of the original judgment. There appears to be no statute expressly regulating this question, but §510 of the local Code of Civil Procedure provides as follows:—

> "When the Supreme Court shall affirm a "judgment of a Court below, for the recov- "ery of money, or shall reverse a judgment of "a Court below, and award a sum of money "as debt or damages, it shall direct that in- "terest be added to the original judgment or "sum determined to be due, from the date of "the former judgment until the date of the "final judgment, at the rate of six per centum "per annum."
>
> (Comp. Acts Phil. Com., p. 929, §2942.)

It is certainly appropriate that a similar practice should be followed when a new trial in the Court below results in a new judgment for a different amount from that of the original judgment.

As soon as the judgment of divorce became operative, the husband was under an obligation to turn over to the wife her share of the conjugal property and it was entirely proper to charge him with interest for his delay in doing so, pursuant to the underlying principle of Art. 1108 of the Civil Code, as follows:—

> "Should the obligation consist in the pay-
> "ment of a sum of money, and the debtor shall
> "be in default, the indemnity for losses and
> "damages, should there not be a stipulation to
> "the contrary, shall consist in the payment
> "of the interest agreed upon, and should there
> "be no agreement, in that of the legal interest.
> "Until another rate is fixed by the govern-
> "ment interest at the rate of six per cent per
> "annum shall be considered as legal."

The wife's share of the conjugal property was fixed at 58,543.37 pesos, *as of July 5, 1902* (Rec p. 49). She has been deprived of it and the husband has had the use of it, or its equivalent in property, since that date, and he should pay the usual legal rate of interest thereon.

The allowance of this interest to the wife in effect takes the place of alimony, but is more favorable to the husband. The Trial Court originally allowed the wife alimony at the rate of 400 pesos a month from the beginning of the suit to the date of the judgment and this was affirmed by the Philippine Supreme Court in its judgment of March 13, 1907 (See Rec. p. 56; also 7 Phil. Rep. at p. 752). This alimony would amount to 4,800 pesos a year. The interest on the judgment amounts to about

3,500 pesos a year. It would be a miscarriage of justice to give the wife neither interest nor alimony to cover this long period of nearly fifteen years, during which the husband has been endeavoring to defeat her rights and has wholly failed to support her.

POINT VI.

Any further delay would work grave injustice.

This is a case in which a husband, who has most grievously injured his wife and has not supported her for some twenty-four years, still seeks to avoid the fulfillment of any of his obligations to her, and interposes every obstacle afforded by complicated legal procedure for this purpose. He is entitled to no consideration, and should not be allowed to obtain any further delay.

There was no error to the prejudice of appellant in the judgment appealed from and even if any of the questions of local law were fairly arguable, the judgment should be affirmed on the doctrine of Villanueva vs. Villanueva, 239 U. S. 293, and cases cited.

The case should have been finally disposed of in the Philippine Supreme Court on the remand from this Court in 1906 after the former appeal. As pointed out in Mr. Justice Johnson's dissenting opinion, the Philippine Supreme Court should have regarded the question of the amount of the conjugal property as a question of fact which they were not authorized to review, and should have affirmed the original judgment of the Court

of First Instance, so that the wife "should not be further annoyed or kept out of that portion of the conjugal property to which she is clearly entitled" (7 Phil. Rep. at pp. 753, 754).

There is no cross appeal here by the wife, but if this Court in the exercise of its power "to review, *revise*, reverse, *modify* or affirm" the decrees of the Philippine Supreme Court (Judicial Code §248) can find a way to reinstate the original judgments of July 5, 1902, it would be in furtherance of substantial justice.

The lack of merit in the grounds upon which the husband's appeal is prosecuted demonstrates that it was taken for delay. This Court should not only affirm, but should award the customary additional 10% as damages for delay under Rule 23 and U. S. Rev. Stats. §§1010 and 1012.

See

Amory vs. Amory, 91 U. S. 356;
Wilson vs. Everett, 139 U. S. 616;
Gibbs vs. Dickma, 131 U. S. Appx. clxxxvi.

POINT VII.

The writ of error should be dismissed for want of jurisdiction.

This is in effect admitted by appellant and need not be argued.

CONCLUSION.

The writ of error should be dismissed and on the appeal the judgment should be affirmed with costs and damages for delay.

Respectfully submitted this 10th day of April, 1916.

FREDERIC R. COUDERT,
HOWARD THAYER KINGSBURY,
Counsel for Defendant in Error and Appellee,
No. 2 Rector Street,
New York City, N. Y.